

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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TEAM TIRES PLUS, LTD., a
Minnesota corporation,

Plaintiff,

vs.

CASE NO.: CIV-01 1124 JP/RLP

TIRES PLUS INC., a
New Mexico corporation,

Defendant.

**PLAINTIFF'S RESPONSE TO DEFENDANT TIRES PLUS INC.'S
DAUBERT MOTION IN LIMINE TO EXCLUDE
THE TESTIMONY AND REPORTS OF
PLAINTIFF'S DAMAGES EXPERT STEVEN S. OSCHER**

Plaintiff Team Tires Plus, Ltd. ("Plaintiff"), by and through its undersigned attorneys, files this its Response to Defendant Tires Plus Inc.'s ("Defendant's") *Daubert* Motion in Limine to Exclude the Testimony and Reports of Plaintiff's Damages Expert Steven S. Oscher.

I. INTRODUCTION.

Defendant argues that pursuant to *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court should exclude the testimony and reports of Plaintiff's damages expert Steven S. Oscher. Defendant contends that Mr. Oscher's opinions are based on unjustified assumptions and are accordingly of no value. As discussed below, Defendant's arguments are based on a fundamental misunderstanding of the remedies sought and burden of proof in this action. Furthermore, any assumptions upon which Mr. Oscher relies in

125

forming his opinions are rationally related to evidence that has been generated in discovery and will be introduced at trial.

II. ARGUMENT.¹

A. MR. OSCHER IS WELL QUALIFIED TO TESTIFY AS A DAMAGES EXPERT IN THIS ACTION.

Defendant fails to recognize and give full credit, by way of omission, to Mr. Oscher's credentials. As indicated by Mr. Oscher's curriculum vitae (attached hereto as Exhibit "1"), he received a degree in accounting from the University of South Florida in 1977 and is a certified public accountant. Mr. Oscher has studied at the graduate level and participates in continuing professional education as both an instructor and a student. Mr. Oscher participates in a number of professional organizations, including the American Institute of CPA's (by which he is accredited in business valuation), the Florida Institute of CPA's (serving on its litigation services sub-committee), the Association of Certified Fraud Examiners (by which he is accredited as a Certified Fraud Examiner), and the National Association of Forensic Economists. Mr. Oscher also sits on the boards of several institutions, including the University of South Florida School of Accountancy, the University of South Florida College of Business, the Florida State Board of Accountancy, and the Accountants Independence Task Force Committee.

On a professional level, Mr. Oscher has worked for several accounting firms in accounting, audit, litigation support, and consulting capacities, and since 1990 has been the Managing Director of Oscher Consulting P.A. As indicated by Mr. Oscher's Rule 26 disclosure (attached hereto as

¹ Plaintiff will not, and is not required to, respond to Defendant's self-serving "Statement of Undisputed Facts" on an item by item basis. In the event that Defendant seizes on this to make frivolous claims of admissions of certain facts or concessions of certain legal arguments in its Reply as it has in connection with other motions, suffice it to say that this listing of allegedly "undisputed" facts is materially incomplete, inaccurate, and misleading, and therefore is "disputed." Furthermore, these allegedly "undisputed" facts in no way support the exclusion of Mr. Oscher's testimony and reports as requested by Defendant. To the extent that any allegedly "undisputed" fact needs to be controverted in this Response, the same will be done in the body of the Response.

Exhibit "2"), he has qualified and served as a damages expert in numerous cases in federal and state court, including cases involving patent and trademark infringement.

Defendant ignores Mr. Oscher's impeccable credentials to serve as a damages expert in this case, likely because they distinguish the case upon which Defendant most heavily relies in its Motion – *First Sav. Bank, F.S.B. v. U.S. Bancorp*, 117 F.Supp.2d 1078 (D. Kan. 2000). While it is true that in *First Sav. Bank* the plaintiff's damages expert was excluded, the Court's holding was based in large part on its finding that the plaintiff's purported damages expert lacked "the requisite skill, experience and knowledge in the field of determining lost profits to financial institutions as to make his opinion rest on a substantial foundation and aid the trier of fact in his search for truth." *Id.* at 1083. In *First Sav. Bank*, the proffered expert (1) did not sign the report upon which his opinion was based, (2) was not a partner with the firm for which he was employed and did not know when or if he would become one, (3) was not a certified public accountant, (4) had not provided his resume for the Court's review, (5) had never before been asked to value harm caused by use of a trade name or trademark, (6) had never testified either by deposition or in trial, (7) had never published any books or articles on valuation, and (8) did not believe that he had ever done a financial analysis of any institution in Kansas before. *Id.* By comparison, Mr. Oscher is imminently qualified to undertake the review and analysis and give the opinions that he offers in this case.

B. MR. OSCHER DID NOT IN HIS INITIAL REPORT ATTEMPT TO CALCULATE DEFENDANT'S PROFITS, SINCE IT IS NOT PLAINTIFF'S BURDEN UNDER 15 U.S.C. § 1117 TO PROVE DEFENDANT'S PROFITS, BUT ONLY TO PROVE DEFENDANT'S SALES. AFTER PLAINTIFF MAKES SUCH PROOF OF SALES, IT IS THEN DEFENDANT'S BURDEN UNDER 15 U.S.C. § 1117 TO PROVE ALL ELEMENTS OF COST OR DEDUCTION CLAIMED TO ARRIVE AT AN AMOUNT EQUAL TO ITS PROFITS. IN HIS INITIAL REPORT, MR. OSCHER SOUGHT ONLY TO PROVIDE A BENCHMARK AGAINST WHICH DEFENDANT'S

DAMAGES EXPERT'S INITIAL REPORT, AS IT RELATED TO ELEMENTS OF COST OR DEDUCTION CLAIMED, COULD BE EXAMINED.

A large part of Defendant's Motion focuses on Mr. Oscher's opinions as they relate to Defendant's profitability, or alleged lack thereof. See Defendant's Motion pp. 6-10. Defendant's claim that Mr. Oscher did not properly calculate its profits is, however, based on a fundamental misunderstanding of the remedies sought and burden of proof in this action.

In an infringement and/or unfair competition case brought under 15 U.S.C. §§ 1114 and/or 1125, the Court may provide a monetary remedy under 15 U.S.C. § 1117, which provides in pertinent part as follows:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 1125(a) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

15 U.S.C. § 1117(a) (emphasis added). The flaw in Defendant's argument is evident from its beginning where Defendant characterizes the award of Defendant's profits sought by Plaintiff as a "measure of damages," thus seeking to apply only a single analysis. See Defendant's Motion p. 6. However, as is made clear in 15 U.S.C. § 1117(a), while awards to a plaintiff of a defendant's profits and/or its damages are both monetary remedies for infringement and unfair

competition, they are not the same. They involve separate and different analyses, and the Court has discretion to fashion a monetary remedy for infringement and unfair competition taking into account either or both, subject to “the principles of equity” and “the circumstances of the case.” See 15 U.S.C. § 1117; see also *Bandag, Inc. v. Al Bolser’s Tire Stores, Inc.*, 750 F.2d 903, 917 (Fed. Cir. 1984) (citing *Mater Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 121 (9th Cir. 1968), *cert. denied*, 391 U.S. 966, 88 S.Ct. 2037, 20 L.Ed.2d 879 (1968)).

In assessing profits, Plaintiff is required to prove Defendant’s sales only; Defendant must prove all elements of cost or deduction claimed. See 15 U.S.C. § 1117; see also *Teaching Co. Ltd. P’ship v. Unapix Entm’t, Inc.*, 87 F.Supp.2d 567, 589-593 (E.D. Va. 2000) (discussing the failure to prove certain elements of cost or deduction by a defendant, who, similar to Defendant, had produced as evidence of its lack of profits financial statements reflecting sustained losses, without providing corroborating proof of line items). Therefore, Mr. Oscher was not in his initial report tasked with opining as to Defendant’s actual profits or examining any elements of cost or deduction that Defendant might claim. See initial report of Steven S. Oscher (excerpts of which are attached to Defendant’s Motion as Exhibit “37”) p. 3. Nor could he have done so, since at the time his initial report was prepared and served, the only financial information that had been provided by Defendant to Plaintiff was Defendant’s gross revenue and advertising figures for the years 1986-2001. See Oscher Initial Report p. 4. It was not until Defendant served its own damages expert’s initial report that Defendant for the first time provided its financial statements and tax returns for the years 1986-2001, and it was not until after the depositions of both Plaintiff’s and Defendant’s damages experts that Defendant provided any further financial information. See Oscher Initial Report p. 4; Deposition of Steven S. Oscher (excerpts of which are attached hereto as Exhibit “3”) pp. 36-37, 41-43, 61-62; rebuttal report of Steven S. Oscher

(excerpts of which are attached to Defendant's Motion as Exhibit "39") p. 4. Defendant's claim that Mr. Oscher "summarily ignored" this information in preparing his initial report is highly misleading.

Given that Plaintiff's burden of proof in assessing profits is only to prove Defendant's sales² and that Defendant's damages expert had not yet been deposed as to the opinions expressed in his initial report, Mr. Oscher was not asked to undertake any further review of Defendant's newly produced financial information between the time of serving his initial report and his deposition thereon. *See* Oscher Depo. p. 64, 120-121. Such work was in the nature of rebuttal, and rebuttal reports were scheduled to be served at a later date. *See* Stipulated Revised Scheduling Orders, Doc. Nos. 38 and 51. Therefore, Defendant's criticisms of Mr. Oscher's initial report and deposition testimony as having been based only on the limited financial information available at the time the initial report was prepared and served, is misplaced.

What Mr. Oscher did do in his initial report in addressing Defendant's profits was to take Defendant's gross revenue figures and apply to them a profit percentage derived from the publicly available RMA Annual Statement Studies that Defendant discusses. As Mr. Oscher testified in his deposition, the profit number that he generated obviously could not represent Defendant's actual profits, but was instead intended to serve only as a benchmark against which Defendant's damages expert's opinions on Defendant's profitability, or alleged lack thereof, could be examined. *See* Oscher Depo. p. 38-39, 40-41.³ Defendant's attack on Mr. Oscher's

² This is an arithmetic exercise based on the gross revenue figures provided by Defendant. There is no disputing that all of Defendant's revenues have been derived under the name TIRE'S PLUS.

³ Defendant's claim that Mr. Oscher did not use the profit number generated by applying the profit percentage derived from the RMA Annual Studies to Defendant's gross revenue figures as a benchmark is contradicted by the deposition testimony quoted by Defendant at pages 7-8 of its Motion. Mr. Oscher was clear in his testimony he was not assuming based on the RMA Annual Statement Studies that Defendant had or had not achieved any particular level of profitability.

methodology based on the allegation that he intended this profit number to be reflective of Defendant's actual profits is also misplaced.

It is not Plaintiff's burden to prove Defendant's profits, but only to prove an entitlement to disgorgement of the same by demonstrating that the equities of the case are such that an award of Defendant's profits under alternative theories of "preventing unjust enrichment and deterring willful infringement" is appropriate. *See Bishop v. Equinox Int'l Corp.*, 154 F.3d 1220, 1222-23 (10th Cir. 1998). If Plaintiff succeeds in its proof of entitlement, then its burden will only be to prove Defendant's sales; Defendant will have the burden to prove all elements of cost or deduction claimed. *See* 15 U.S.C. § 1117; *see also Teaching Co.*, 87 F.Supp.2d at 589. It is therefore only in calculating the total of Defendant's gross sales for the years in question (which Defendant has not claimed that Mr. Oscher did improperly) and offering testimony in rebuttal to Defendant's proof of elements of cost or deduction, including its damages expert's opinions on the same, that Mr. Oscher's opinions as to Defendant's profits will become relevant. Defendant's criticism of Mr. Oscher's initial report and testimony thereon as not having properly calculated Defendant's profits is without merit.

Furthermore, even if the finder of fact, after considering the testimony of Plaintiff's and Defendant's damages experts, finds that Defendant has in fact been unprofitable or that Defendant's assertion of unprofitability is not credible, the Court may still fashion an award of profits based on the equities of the case, on the theory that Plaintiff should not be prejudiced by Defendant's inefficiency. *See, e.g., Hospitality Int'l, Inc. v. Mahtani*, 1998 U.S. Dist. LEXIS 16445, *31-32 (M.D.N.C. 1998) (citing *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985) and *KFC Corp. v. Lilleoren*, 821 F.Supp. 1191, 1192 (W.D. Ky. 1993)). In such a case the benchmark provided by Mr. Oscher would become highly relevant because it

would provide the trier of fact with an applicable and appropriate measure for arriving at an award of Defendant's profits in the absence of sound evidence of elements of cost or deduction by Defendant.

C. MR. OSCHER'S OPINIONS AS EXPRESSED IN HIS REBUTTAL REPORT AND DEPOSITION TESTIMONY WILL BE OF GREAT ASSISTANCE TO THE FINDER OF FACT IN ASSESSING THE WEIGHT TO BE GIVEN TO DEFENDANT'S DAMAGES EXPERT'S OPINIONS ON DEFENDANT'S CLAIMED ELEMENTS OF COST OR DEDUCTION.

Defendant claims that "no opinions are given in [Mr. Oscher's] rebuttal report." *See* Defendant's Motion p. 9. This claim is clearly untrue as shown by the "Findings and Conclusions" of Mr. Oscher's rebuttal report. *See* Oscher Rebuttal Report p. 4. The opinions expressed in Mr. Oscher's rebuttal report are twofold: (1) that Defendant's damages expert's analysis of Defendant's financial information is severely lacking and (2) that the financial information produced by Defendant "have not provided the detail needed to fully evaluate Defendant's operations and, as a result, it remains difficult to conclude that [Defendant] operated unprofitably for fourteen of the prior sixteen years." *See id.*

As set out in Plaintiff's motion to exclude the testimony and initial report of Defendant's damages expert from this proceeding, the analysis of Defendant's financial information undertaken by Defendant's damages expert is so lacking that he ought not be permitted to testify at trial. *See* Plaintiff's Motion to Exclude Testimony and Report of Expert Witness Bruce F. Malott, Doc. No. 77. Rather than exclude this expert, the Court has determined to permit him to testify and allow the finder of fact to assess the weight to be given to his testimony. *See* Memorandum Opinion and Order, Doc. No. 115. That being the case, Mr. Oscher's critique of the depth of Defendant's damages expert's analysis, or lack thereof, will be of great assistance to the finder of fact. Mr. Oscher was clear in his rebuttal report that he was of the opinion that Defendant's damages expert's

analysis was severely lacking in light of the facts of this case, and Defendant has deposed Mr. Oscher as to this opinion.

The second part of Mr. Oscher's opinion relates to the financial information supplied by Defendant to date. While Defendant characterizes Mr. Oscher's opinion that this financial information does not allow him to reach any conclusion as to Defendant's profitability, or alleged lack thereof, as being "no opinion," Defendant misunderstands the significance of Mr. Oscher's statement. The expressed purpose of Mr. Oscher's rebuttal report was to evaluate the conclusions of Defendant's damages expert, not to calculate for Defendant its own elements of cost or deduction claimed. *See* Oscher Rebuttal Report p. 3. Mr. Oscher's evaluation of the initial report and testimony of Defendant's damages expert is that the information provided, even when supplemented with information subsequently provided by Defendant, is insufficient to reach a sound conclusion as to Defendant's profitability. *See id.* p. 4. Therefore, the opinions expressed by Defendant's damages expert are inherently unreliable and cannot be given significant weight. Again, it is Defendant's burden to prove elements of cost or deduction in assessing profits. The significance of Mr. Oscher's opinion as expressed in his rebuttal report is that Defendant has not met that burden, and Defendant has deposed Mr. Oscher as to this opinion as well.

There are serious doubts as to the veracity of Defendant's position that it has operated unprofitably for 14 of 16 years, incurring losses in excess of \$1,200,000.00 during those years, and yet remained in business. Both Plaintiff's and Defendant's damages experts agree that this set of facts is highly unusual, and would prompt questions. *See* Oscher Depo. pp. 57-62; Deposition of Bruce F. Mallott (excerpts of which are attached to Plaintiff's Motion to Exclude Testimony and Report of Expert Witness Bruce F. Malott, Doc. No. 77, as Exhibit "1") pp. 22-24. The parties dispute whether Defendant's damages expert dug deeply to confirm that this is truly what happened,

and Mr. Oscher's testimony to the effect that Defendant's damages expert barely scratched the surface, and so his opinions are therefore highly suspect, will be relevant and of great assistance to the finder of fact.

D. MR. OSCHER'S OPINIONS AS TO PLAINTIFF'S DAMAGES ARE RATIONALLY RELATED TO EVIDENCE THAT HAS BEEN GENERATED IN DISCOVERY AND WILL BE INTRODUCED AT TRIAL.

Defendant challenges Mr. Oscher's opinions as to Plaintiff's damages claim as being based on the assumptions that: (1) Plaintiff would have offered Defendant a franchise, (2) Defendant would have accepted a franchise from Plaintiff pursuant to which it would have paid to Plaintiff franchise royalties, and (3) as a franchisee Defendant would have made a certain percentage of its tire purchases through Plaintiff. Defendant claims that these assumptions are "unjustified and arbitrary," and render Mr. Oscher's opinions speculative and inadmissible. *See* Defendant's Motion pp. 3, 5-6, 10-12. To the contrary, as discussed below, any assumptions made by Mr. Oscher are rationally related to evidence that has been generated in discovery and will be introduced at trial, and his opinions are clearly and directly supportive of Plaintiff's damages claims.

1. **Even the antitrust and personal injury cases cited by Defendant in support of its position do not support its arguments. The cases cited by Defendant stand only for the proposition that in Lanham Act cases, where exacting proof of damages is frequently difficult, the Court has considerable discretion to fashion an award of monetary damages, and the infringer will bear the risk of any uncertainty inherent in such calculations.**

Relying primarily on a series of antitrust and personal injury cases, Defendant argues that "[c]ourts have repeatedly excluded expert testimony related to damages when the proffered opinions are based on unjustified assumptions." *See* Defendant's Motion p. 5. However, the holdings in these cases are inapposite. Notably, even in cases that do not involve claims of trademark infringement and unfair competition, courts in the Tenth and other Circuits have held that

“[a]lthough an expert opinion must be based on ‘facts which enable [her] to express a reasonably accurate conclusion as opposed to conjecture or speculation, ... absolute certainty is not required.’” *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995) (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988)); *see also Marquis v. Chrysler Corp.*, 577 F.2d 624, 638 (9th Cir. 1978) (expert testimony based on assumptions and estimates permitted as the same were not “demonstrably false or unreasonable”). Taking this willingness to accept expert testimony on the issue of damages a step further, in Lanham Act cases it has been repeatedly held that “an inability to show actual damages does not alone preclude a recovery under section 1117.” *Bandag*, 750 F.2d at 919; *see also Mirage Resorts, Inc. v. Stirpe*, 152 F.Supp.2d 1208, 1218 (D. Nev. 2000); *Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 834 F.Supp. 1008, 1013 (N.D. Ill. 1993).

The language found in 15 U.S.C. § 1117⁴ provides the Court with considerable discretion to award damages based on equitable considerations. *See Mirage*, 152 F.Supp.2d at 1218; *Bandag*, 750 F.2d at 917 (citing *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 121 (9th Cir. 1968), *cert. denied*, 391 U.S. 966, 88 S.Ct. 2037, 20 L.Ed.2d 879 (1968)). The Court may award damages even when they are not susceptible to precise calculation. *See Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562, 1565 (11th Cir. 1986). “What is relevant is that...the *fact of damage* has been established with reasonable certainty....[W]here the evidence shows the fact of damage, there can be recovery even though there is no clear standard for measuring the extent of the injury. The rationale for this approach is that ‘[the] most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.’” *See Big O Tire Dealers, Inc. v. The Goodyear Tire & Rubber Co.*, 408 F.Supp. 1219.

⁴ “If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.” 15 U.S.C. § 1117(a).

1232-33 (D. Col. 1976) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed. 652 (1946)). Recognizing that arriving at a monetary award in a trademark case is an imprecise exercise, the Tenth Circuit has in certain cases even instructed the district court to simply “fashion a remedy that ‘will satisfy the equities of the case.’” See *Bishop*, 154 F.3d at 1224 (quoting *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 131, 67 S.Ct. 1136, 91 L.Ed. 1386 (1947)).

The Lanham Act cases cited by Defendant in support of its position are consistent with the foregoing. For example, in *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 525-26 (10th Cir. 1987) (one of the few Lanham Act cases cited by Defendant in its Motion), although the plaintiff had met its burden of proving an entitlement to damages, it had difficulty quantifying the exact amount of its damages attributable to the defendant’s infringement. The plaintiff in *Brunswick* argued in support of its claim for damages that it should be assumed to have lost one unit of its sales for each unit of sales made by the defendant. *Id.* at 526. The district court rejected this analysis as being too speculative, finding that “although [the plaintiff] established a legal basis for damages, it failed to establish clear proof of damages.” *Id.* at 525. The district court refused to assess damages against the defendant. *Id.* at 526.

The Tenth Circuit Court of Appeal reversed, stating that “[a] defendant whose wrongful conduct has caused the difficulty in assessing damages cannot complain that the damages are somewhat speculative....Evidence of the amount of damages may be circumstantial and inexact.” *Id.* at 526 (citations omitted). Although the *Brunswick* court agreed that the plaintiff’s assumption upon which its damages calculation was based – a sale lost for each sale by the defendant – was somewhat speculative, it held that “[t]hose items of evidence provide the court a broad basis from which it may arrive at a fair, if not precise, amount with which to compensate [the plaintiff] for

wrongful infringement.” *Id.* The *Brunswick* court remanded to the district court to determine the amount of damages due to the plaintiff.

2. **Mr. Oscher’s calculation of Plaintiff’s economic damages as consisting of lost franchise royalties and tire margin based on historical data regarding Plaintiff’s franchise royalty rates and its franchisees’ purchases of tires through Plaintiff, provides a rational basis upon which the finder of fact could fashion an award of damages for Plaintiff.**

Defendant relies heavily on the holding in *First Sav. Bank, supra*, to support the strict “but for” analysis in which it would have the Court engage. However, in the context of that case, the Court did not promulgate such an analysis as applicable to all Lanham Act cases, but was instead addressing a proposed opinion by the plaintiff’s purported damages expert that was based on an assumption that “improperly attributed all [of the plaintiff’s] losses to the defendants’ allegedly illegal acts, despite the presence of other factors that could be significant to his analysis.” *Id.* at 1084. The Court listed a multitude of other factors that could have contributed to the plaintiff’s losses. *Id.* at 1084-85. However, the plaintiff’s purported damages expert took none of those other factors into consideration, creating serious questions as to causation of the damages claimed. *Id.* at 1084. This failure on the part of the plaintiff’s purported damages expert (who as noted in Section A above could not even qualify as a damages expert) so infected his basic methodology, that it rendered his proposed testimony “inherently unreliable and purely speculative.” *Id.* at 1084-85. Further, the Court found that the assumption upon which this proposed testimony was based was so flawed that the testimony “would not assist the jury in determining the amount of actual damages defendant caused plaintiff to suffer.” *Id.* at 1085. The Court therefore excluded the expert. *Id.* The holding in *First Sav. Bank* is indicative of how flawed an expert’s assumptions must be before the expert’s testimony will be entirely excluded.

Unlike in *First Sav. Bank*, Mr. Oscher's qualifications are not, nor can they be, challenged by Defendant. In addition, the facts of this case provide a rational basis for Mr. Oscher's calculation of Plaintiff's damages based on an assumed loss of revenues at the franchise level in the form of unpaid franchise royalties and lost tire margin.⁵ Plaintiff (currently through its subsidiary Tires Plus Franchising Corporation) is in the business of franchising retail tire stores and automobile maintenance centers pursuant to a proprietary marketing plan or system developed and owned by Plaintiff under the mark TIRES PLUS. See Affidavit of John Hyduke (attached to Plaintiff's Motion for Summary Judgment, Doc. No. 72, as Exhibit "A") ¶¶4-9. So as to guarantee to the consuming public the consistency and high quality of services received from retail outlets that are part of the TIRES PLUS® franchise system, Plaintiff attaches to such outlets, and permits such outlets to use, its mark TIRES PLUS. See Hyduke Aff. ¶¶18-20. The assumption implicit in Mr. Oscher's analysis is that if Defendant desires to take advantage of the significant benefit of using the TIRES PLUS name in connection with its business, a right reserved only for Plaintiff and its affiliates and franchisees, then it should bear the financial burdens that are common to similarly situated parties, specifically Plaintiff's franchisees.

In an attempt to avoid liability for damages, Defendant argues that Tires Plus has not been damaged since it has not to date entered New Mexico and does not have specific plans to enter New Mexico. However, Plaintiff is being, and has been, damaged by Defendant's current infringement and unfair competition. As discussed in the deposition of Plaintiff's corporate representative John Hyduke, Plaintiff generally develops new markets employing a "concentric

⁵ As used in this Response, the term "tire margin" (also referred to by Defendant as "inventory mark up") is defined as the difference between the price at which Plaintiff can purchase tires from manufacturers and the price at which it sells the same tires to franchisees. Sometimes this is also realized by Plaintiff in the form of incentives received directly from tire manufacturers as a result of Plaintiff's or its franchisees' purchases of tires from such manufacturers.

circle” strategy. It starts with company stores at the hub of the circle and fills in the concentric circles around the hub with a combination of company-owned and franchised locations. *See* Deposition of John Hyduke (excerpts of which are attached to Plaintiff’s Response to Defendant’s Second Motion for Partial Summary Judgment Against Plaintiff’s Damages Claims as Exhibit “E”) p. 24. Plaintiff began forming plans to develop the Denver, Colorado market in 1997, with a launch planned for 2000. As part of Plaintiff’s development strategy, additional stores would be developed up and down the “front range.”⁶ *See* Deposition of Donald M. Gullett (excerpts of which are attached to Plaintiff’s Response to Defendant’s Second Motion for Partial Summary Judgment Against Plaintiff’s Damages Claims as Exhibit “C”) pp. 157-159. Therefore, as early as 1997, Defendant was doing business in a market area that was scheduled for development by Plaintiff.

In 2000, Plaintiff invited Defendant to resolve the current issues by exploring a license arrangement with Plaintiff whereby it would be “permitted to use the TIRES PLUS® name as an authorized licensee.” Defendant declined. However, this proposal is indicative of Plaintiff’s interest in Albuquerque, New Mexico. *See* Deposition of Donald E. Leonard (excerpts of which are attached to Plaintiff’s Response to Defendant’s Second Motion for Partial Summary Judgment Against Plaintiff’s Damages Claims as Exhibit “B”) pp. 207-211, Exhibit “25”; Hyduke Aff. ¶28.

In 2001, Plaintiff received an inquiry regarding its franchise program from Gary Fox, to which it responded, further evidencing its interest in the Albuquerque, New Mexico market. While Defendant draws its own inferences from Mr. Fox’s actions and testimony, equally strong inferences that Mr. Fox decided against becoming a TIRES PLUS® franchisee because of

⁶ This was described as extending from Canada to New Mexico. *See* Gullett Depo. pp. 159-160

Defendant's (1) current use of the mark TIRES PLUS in Albuquerque, New Mexico, (2) dispute with Plaintiff, and (3) communications to Mr. Fox regarding this action, can also be drawn from the timing and nature of Defendant's communications to Mr. Fox and Mr. Fox's announcement that he was no longer interested in associating with Plaintiff. *See* Deposition of Gary Fox (excerpts of which are attached to Plaintiff's Response to Defendant's Second Motion for Partial Summary Judgment Against Plaintiff's Damages Claims as Exhibit "D") pp. 5-6, 11-21, 22-24, 28-31, 35, 41-42, Exhibit "1."

While Plaintiff does not yet have "specific" plans to enter the Albuquerque, New Mexico market in terms of specifically identified franchisees and locations, the development of "specific" plans is problematic. Defendant has already sued Plaintiff for alleged infringement of Defendant's common law rights in its attempted counterclaim in this action, which obviously has a chilling effect on Plaintiff's desire to heavily invest in the Albuquerque, New Mexico market or contract with potential franchisees until this matter is resolved. Yet Plaintiff continues to develop the front range, approaching New Mexico, and does "plan" to develop the New Mexico market consistent with its intentions expressed in this action. *See* Hyduke Aff. ¶¶28-35. Defendant's unsupported statements to the contrary are misleading.

Defendant has been using the mark TIRES PLUS on an unauthorized, royalty-free basis since 1986, has known this since 1994, and is currently standing in the way of Plaintiff's development plans by its usurpation of the Albuquerque, New Mexico market. *See* Leonard Depo. pp. 195-207, Exhibits "21," "22," "23," and "24"; Gullett Depo. pp. 133, 138-140, 144. Granted Defendant has not received all of the other benefits that Plaintiff's franchisees receive, however, that is by Defendant's choice despite Plaintiff's offer that it become part of the TIRES PLUS® franchise system. Plaintiff has been damaged and continues to be damaged, and while

such damages are difficult to quantify, that does not mean that the Court, given the equities of this case, has no power or authority to craft a monetary award. *See Big O*, 408 F.Supp. at 1232-33.

In similar instances, it has been held appropriate to measure the damages awarded for unauthorized trademark usage by reference to a royalty rate under which the trademark was otherwise licensed, or by reference to a royalty rate offered by a party, but rejected by the trademark owner prior to infringement by the party. *See, e.g., Sands, Taylor & Wood v. Quaker Oats Co.*, 34 F.3d 1340 (7th Cir. 1994); *Holiday Inns, Inc. v. Airport Holiday Corp.*, 493 F.Supp. 1025 (N.D. Tex. 1980); *Boston Prof'l Hockey Ass'n, Inc. v. Dallas Cap & Emblem Manufacturing, Inc.*, 597 F.2d 71 (5th Cir. 1979). This approach is generally permissible so long as the measure of damages comports with the equitable limitations of 15 U.S.C. § 1117 and bears a rational relationship to the rights appropriated. *See Holiday Inns*, 493 F. Supp. at 1028; *Boston Prof'l Hockey*, 597 F.2d at 76.

As discussed above, Plaintiff is engaged in the business of licensing, among other things, the right to use the name and mark TIRES PLUS for retail tire stores and automobile maintenance centers. Therefore, determining a reasonable royalty rate would not only be simple and straightforward, but also appropriate in this case. Mr. Oscher's use of a royalty rate based on an assumed franchisor/franchisee relationship between Plaintiff and Defendant dating back to 1994 to calculate Plaintiff's economic damages is entirely appropriate.

As a further element of Plaintiff's economic damages, Mr. Oscher, based on the assumption that Defendant would have been a franchisee of Plaintiff beginning in 1994 and acted as the average franchisee, calculated Plaintiff's lost tire margin. As Mr. Oscher explained, the percentages that he used to arrive at this figure were derived from Plaintiff's and its franchisees'

historical data. *See* Oscher Depo. pp. 78-98. Whether or not Defendant would have functioned as an average franchisee is open to debate, however, the facts are that the average franchisee does buy a certain percentage of its tires through Plaintiff and that Plaintiff does profit therefrom. Therefore, there is a reasonable basis for the assumption employed by Mr. Oscher in calculating Plaintiff's lost tire margin as an element of Plaintiff's economic damages.

Contrary to Defendant's assertion, there is no speculation as to whether Plaintiff would have offered to make Defendant one of its franchisees. Plaintiff did so. While Defendant rejected these offers and instead continued to use Plaintiff's mark on an unauthorized, royalty-free basis, that does not render a calculation of Plaintiff's damages, based on what Plaintiff would have expected to receive had Defendant actually become a franchisee and properly licensed user of Plaintiff's mark TIRES PLUS, speculative. To the contrary, similar to the holdings *Sands*, *Taylor & Wood*, *Holiday Inns*, and *Boston Profl Hockey*, it provides a rational basis upon which a calculation of Plaintiff's economic damages can be made. To the extent that any speculation is involved, similar to the defendant in *Brunswick*, *supra*, Defendant should not be heard to complain as it is Defendant's wrongful conduct that has damaged Plaintiff, and Plaintiff should be compensated for its damages.

E. IT WOULD BE HIGHLY PREJUDICIAL TO PLAINTIFF FOR MR. OSCHER'S TESTIMONY TO BE EXCLUDED.

Defendant concludes its Motion arguing that "[e]ven if Mr. Oscher's opinions are deemed reliable and relevant, they should be excluded under Rule 403 of the Federal Rules of Evidence," arguing that it will be prejudiced by such testimony. *See* Defendant's Motion p. 12-13. It is inconceivable that if Mr. Oscher's opinions are deemed "reliable and relevant" they should not be admitted. At trial, Plaintiff will establish an entitlement to (1) Defendant's profits and/or

(2) damages sustained by Plaintiff, and will need to rely on the "reliable and relevant" opinions offered by Mr. Oscher to assist the finder of fact in quantifying such profits and/or damages. Defendant argues, without support, that it will be prejudiced if Plaintiff is permitted to so rely on Mr. Oscher's opinions. To the contrary, Plaintiff is the only party that will be prejudiced should Mr. Oscher's opinions be excluded and Defendant's damages expert be permitted to testify free of any threat of rebuttal.

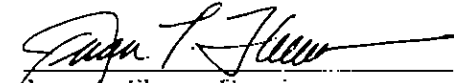
Defendant cites *First Sav. Bank, supra*, in support of its position. However, as discussed above, the purported damages expert in that case was not excluded based solely on the concern of prejudice to the defendant, but instead because (1) he could not qualify as an expert and (2) his opinions were based on a fundamentally flawed assumption and methodology. Absent any legitimate claim of prejudice, Defendant lapses back into its arguments that Mr. Oscher's opinions are based on unjustified assumptions to justify its request for their exclusion, to which arguments Plaintiff has fully responded above. Mr. Oscher's opinions are reliable, relevant, and probative, and Plaintiff should not be hamstrung in the presentation of its case for damages by the exclusion of such opinions. Defendant has been permitted to introduce the opinions of its damages expert to establish its claimed elements of cost or deduction and to rebut Plaintiff's claim for damages. It would be highly prejudicial to Plaintiff if Mr. Oscher's contrary opinions were to be excluded.

III. CONCLUSION.

As demonstrated above, Defendant's arguments are based on a fundamental misunderstanding of the remedies sought and burden of proof in this action. Furthermore, any assumptions upon which Mr. Oscher relies in forming his opinions are rationally related to evidence that has been generated in discovery and will be introduced at trial.

WHEREFORE, Plaintiff requests that Defendant's *Daubert* Motion in Limine to Exclude the Testimony and Reports of Plaintiff's Damages Expert Steven S. Oscher be denied.

Respectfully submitted,



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Attorneys for Plaintiff, Team Tires Plus, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was sent by Hand Delivery to Travis R. Collier, Esquire and DeWitt M. Morgan, Esquire, Rodey, Dickason, Sloan, Akin & Robb, P.A., 201 Third Street NW, Suite 2200, Albuquerque, New Mexico 87102, on this 2nd day of April, 2003.



Juan A. Flores, Esquire
C. Philip Campbell, Jr. Esquire
J. Todd Timmerman, Esquire

STEVEN S. OSCHER, CPA**Education:**

- **B.S. Accounting 1977**
University of South Florida
- **Graduate studies at University of South Florida**
as well as continuing professional education as an
instructor and student

Employment:

1990 – Present	Oscher Consulting, P.A. Managing Director
1990 – 1991	Coopers & Lybrand - Consultant
1984 – 1990	Laventhol & Horwath - Partner Director, Litigation Support Services Director, Accounting & Auditing Services
1981 - 1984	Coopers & Lybrand - Audit Manager
1977 - 1981	Grant Thornton - Audit Supervisor

Professional:

- **American Institute of CPA's**
(Accredited in Business Valuation)
- **Florida Institute of CPA's**
- **Association of Certified Fraud Examiners**
(Accredited as a Certified Fraud Examiner)
- **Florida Institute of CPA's Litigation Services Sub-Committee**
- **University of South Florida School of Accountancy, Board of Directors**
- **University of South Florida College of Business, Deans Circle Board**
Member
- **National Association of Forensic Economists**
- **Florida State Board of Accountancy, Board Member, past Chairman**
and Vice Chairman
- **American Arbitration Association, National Roster of Neutrals member**
- **Accountants Independence Task Force Committee, Chairman**

Community:
(current and past)

- **Florida Bar Grievance Committee**
- **Tampa Chamber of Commerce**
- **Leadership Tampa, Chairman**
- **Committee of 100 Task Force, Vice Chairman**
- **University of South Florida**
National Alumni Association, President
College of Business, Advisory Board Chairman
- **Hillsborough County Bar Association**
- **Sun Dome, Inc., Board of Directors**
- **Unlicensed Practice of Law Committee member**
(Appointed by the Florida Supreme Court)
- **FICPA Valuation and Litigation Services Committee member**

Publications:

- **"Preparation of a Case: Inception to Trial"**
Florida CPA Today

Military:

1966 - 1972	U.S. Navy - Submarine Service Clearance: Top Secret
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EXHIBIT

1

**STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND**

Exhibit II

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A. Tampa, Florida Re: Lost Profits	92-12768-CA DIV CV-O Jacksonville, Florida Circuit Court	Cargill, Inc. v. Griffin Industries, Inc.
Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. Tampa, Florida Re: Patent Infringement/ Economic Damages	93-1117-CI-15 Tampa, Florida Federal Court	Sensonics v. Aerosonic
Maney, Damsker, Harris, P.A. Tampa, Florida Re: Marital Dissolution	93-13982 Div "K" Tampa, Florida Hillsborough County	McKenzie v. McKenzie
Annis, Mitchell, Cockey, Edwards & Roehn, A. Tampa, Florida Re: Employment Agreement/ Economic Damages	93-4515 Div "C" FNB: 183685 FNB: 774146 Tampa, Florida	Marc S. Ayers v. Belmac Corp., a Florida Corp. & Michael M. Harshbarger
Alpert, Barker & Calcutt, P.A. Tampa, Florida Re: Employment Dispute	94-03705 Tampa, Florida Federal Court	Cindy Morris v. Lawrence W. Crow, Jr. et al.
Alpert, Barker & Calcutt, P.A. Tampa, Florida Re: Wrongful Termination	93-301-CIV-T-17B U.S. District Court	Laura A. Park v. First Union Brokerage
Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. Tampa, Florida Re: Economic Damages/ Trust Venture	CA-88-5096 Div "Y" Tampa, Florida Hillsborough County	American Plasticraft et al. v. Newburn et al.
Mr. Peter Moll, Esquire Howry & Simon Washington, D.C. Re: Fraud Investigation/ Termination Distributorship	95-241-CIV-J-16	Anheuser Busch, Inc. v. A-B Distributors, Inc.

EXHIBIT

2

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. Arnold Levine, Esquire Levine Hirsch Segall & Northcutt, P.A. Tampa, Florida Re: Asset Valuation	GC-F-95-289 Circuit Court, 10th Judicial Circuit Polk County, FL	Ben Wilson Bane v. Consuella Kathleen Bane
Mr. David M. Boggs, Esquire MacFarlane, Ausley, Ferguson & McMullen, P.A. Tampa, Florida Re: Fraud Investigation	94-1176-CIV-T-17C	Anthony Distributors, Inc. v. Miller Brewing Co.
Mr. Wil H. Florin Esquire and Mr. Dennis Rogers, Esquire Florin, Roebig, Walker & Huddelstun, P.A. Clearwater, Florida Re: Asset Valuation / Fraud Investigation	Probate No. 95-2371 TR Pinellas County, Florida	William Baumgardner et al. v. Joe R. Wolfe, Esquire
Empton Logan Ft. Myers, Florida Re: Lost Profits	95-245-CIV-FTM-25D	Days Inn Island Beach Resort v. Highlands Insurance Company
Chris Rodems Alpert, Barker & Calcutt, P.A. Tampa, Florida Re: Employment Damages	95-2904 Div "B"	Joanne and Frank Cuonzo v. GTE Directories Sales Corporation
Mr. Richard M. Zabak, Esquire & Mr. Peter Kelly, Esquire Shackleford, Farrior, Stallings & Evans, P.A. Tampa, Florida Re: Economic Damages from Trust Dispute	95-003761	Nancy G. Dickson, Mark L. Dickson & Carol Anne Dickson v. Rena Janet Hall, Charles D. Hall & Joseph Dale Hall
Mr. William J. Schifino, Jr., Esquire Williams, Reed, Weinstein, Schifino & Mangione, P.A. Tampa, Florida Re: Valuation of Assets, Accountant's Liability	94-1249-CIV-T-17B	SEC v. Seahawk Deep Ocean Technology, Inc., John C. Morris, Gregory H. Stemm & Daniel S. Bagley

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Ms. Patricia Kuhlman, Esquire Maney, Damsker, Harris & Jones, P.A. Tampa, Florida Re: Business Valuation	Circuit Civil No. 94-4078-FD-22 Pinellas County, Florida	Korones v. Korones
Mr. Frank R. Jakes, Esquire Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. Tampa, Florida Re: Patent Infringement	94-1252-CIV-T-24E Tampa Division Hillsborough County, Florida	Duane H. Newville & The Boden Co., Inc. d/b/a Adjust-A- Brush v. Starbrite Distributors Inc. and Peter Dornau, Sr.
Mr. Patrick Calcutt, Esquire Alpert, Baker & Calcutt, P.A. Tampa, Florida Re: Wrongful Termination	NASDA 94-02956	Cray, Hovis & Lewis v. Nations Bank
Ms. Marion B. Rush, Esquire Salem, Saxon & Nielsen, P.A. Tampa, Florida Re: Asset Issues relating to Joint-Venture Dissolution	95-931-CIV-J-10	Resolution Trust Corporation, etc. v. The Dove Group, etc.
Mr. David J. Stefany, Esquire Hogg, Allen, Norton & Blue, P.A. Tampa, Florida Re: Wrongful Termination	93-1871 Hillsborough County Court, Florida	Ikehata v. Spalding & Evenflo, Spalding Sporting Goods
Mr. Bennett Falk, Esquire Morgan, Lewis & Bockius, P.A. Miami, Florida Re: Wrongful Termination	NASDA Arbitration	Keith Ligori v. Merrill Lynch et al.
Mr. Robert P. Frankel, Esquire Lapidus & Frankel, P.A. Miami, Florida Re: Accountants Liability Issues	95-17396-CA-03	Scott King et al. v. Phillip H. Bergman et al.

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. John P. Holsonback, Esquire Fuller & Holsonback, P.A Tampa, Florida Re: Economic Damages	95-2488	H. Hoogewerff Junior & Co., v. Robert J. Dammers
Mr. G. Donovan Conwell, Esquire Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. Tampa, Florida Re: Economic Damages/ Lost Profits	95-4049CI20	G.S. Tucker & Co. of Wilson, Inc., Tucker Furniture Co. of Rocky Mount, Inc., and G.S. Tucker & Co. of Smithfield Inc. v. Tyler Business Systems, Inc.
Mr. Buddy Ford, Esquire Buddy D. Ford, P.A. Tampa, Florida Re: Economic Damages	96-325-8B1 U.S. Bankruptcy Court Middle District of FL Tampa Division	Cal's Lawn Equipment, Inc. v. Weaver Enterprises, Inc.
Mr. Jeffrey Fuller, Esquire Williams, Brasfield, Wertz, Fuller, Freeman & Lovell, P.A. St. Petersburg, Florida Re: Punitive Damages	96-3995-CI-13 Pinellas County, Florida	Bruno v. Taco Bell et al
Mr. John Emmanuel, Esquire Fowler, White, Gillen, Boggs, Villareal, & Banker, P.A. Tampa, Florida Re: Economic Damages	95-1432 Division A Hillsborough County Florida	Mayda Menendez et al. v. Margarita Mills et al.
Mr. William J. Schifino, Jr., Esquire Williams, Reed, Weinstein, Schifino & Mangione, P.A. Tampa, Florida Re: Economic Damage / Personal Injury	93-1465-CI Circuit Court, 6 th Judicial Circuit, State of Florida, Pinellas County	John Stroud v. Jonathan R. Strawn, Post, Buckley, Schuh & Jernigan, Inc.
Mr. Frank R. Jakes, Esquire Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. Tampa, Florida Re: Trademark / Lost Profits	96-1635-CIV-T-25E United States District Court, Middle District of Florida, Tampa Division	World Triathlon Corporation, Inc. v. Textron, Inc d/b/a Spidel

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. Scott Ilgenfritz, Esquire Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. Tampa, Florida Re: Contract Dispute / Proper Accounting Treatment	96-2075 Circuit Court, 13 th Judicial Circuit, State of Florida Hillsborough County Division C	Hayward & Associates and The Polo Group, Inc. v. Golf Enterprises, Inc.
Mr. Richard A. Hirsch, Esquire Levine, Hirsch, Segall & Northcutt, P.A. Tampa, Florida Re: Economic Damages / Personal Injury	96-3266-CI Circuit Court, 6 th Judicial Circuit, State of Florida, Pinellas County, Division 013	Raymond J. Behar, M.D. and Susan L. Behar v. United Services Automobile, Association
Mr. Arnold Levine, Esquire Levine, Hirsch, Segall & Northcutt, PA Tampa, Florida Re: Business Valuation	96-00044 Circuit Court, 13 th Judicial Circuit State of Florida, Hillsborough County, Division "S"	Barbara Mary Westrate v. David Bruce Westrate
Mr. Charles W. Pittman, Esquire Charles W. Pittman, PA Tampa, Florida Re: Economic Damages	United States District Court, Middle District of Florida, Tampa Division	Advance Leasing and Development, Inc., Peter Geraci, and Roy N. Geraci v. Hillsborough County et al.
Mr. Frank Winkles, Esquire Cunningham Clark & Greiwe, PA Tampa, Florida Re: Economic Loss	96-5668-CI Circuit Court 9th Judicial Circuit Orange County, FL	Jim Howze Corporation v. Orange County
Ms. Nancy Harris, Esquire Nancy Harris, PA Tampa, Florida Re: Marital Dissolution	96-014630, Division F Circuit Court Hillsborough County, FL Family Law Division	Betty S. Hay v. Charles P. Hay, Monica Cooper, Kenneth W. Hay, et al.
Mr. Frank Winkles, Esquire Cunningham Clark & Greiwe, PA Tampa, Florida Re: Personal Injury		Dr. J. Michael Rivard v. Massachusetts Mutual

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. Noel Evans, Esquire Evans & Donica, PA Tampa, Florida Re: Accountant's Liability	97-1117, Division H Circuit Court Hillsborough County, FL	Margaret Davis and Violet C. Beasley v. William H. Durkin
Mr. Jonathan Alpert, Esquire Alpert Barker & Rodems, PA Tampa, Florida Re: Wrongful Termination	NASD Arbitration No. 9-04586	Bullins et al v. NationsSecurities et al.
Mr. Robert Roche, Esquire Annis Mitchell Edwards Cockey & Roehn, PA Tampa, Florida Re: Contractors Dispute / Economic Damages	No. 95-6659 Division P Hillsborough County Florida	Performance Office Products, Inc., v. Xerox Corporation
Mr. James B. Murphy, Esquire Shackleford Farrior Evans & Stallings, PA Tampa, Florida Re: Calculation of Economic Damages	97-04986 Circuit Court Hillsborough County Florida	Ekk Will Tropical Fish Farm, Inc., d/b/a Ekk Will Waterlife Resources v. David W. Kitchen d/b/a Terraqua
Mr. Ralph P. Mangione, Esquire Williams Reed Weinstein Schifino & Mangione, PA Tampa, Florida Re: Marital Dissolution / Valuation of Business	97-01683 Circuit Court Hillsborough County, FL Family Law Division	Thomas G. Middleton v. Michelle H. Middleton
Ms. Christine Lamia, Esquire Becker & Poliakoff, PA Sarasota, Florida Re: Economic Damages	97-5710 CA-01 Circuit Court Sarasota County, FL Civil Division	Angie D. Hall, Inc., v. American Marine Holdings, Inc.
Ms. Tammy Giroux, Esquire Shumaker Loop & Kendrick, LLP Tampa, Florida Re: Economic Damages	98-25060-BKC-AJC US Bankruptcy Court Sthn District of Florida Chapter 11	Richmond Health Care, Inc., d/b/a Sunrise Health and Rehabilitation Center v. CMS Therapies, Inc.

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Ms. Meredith Wester, Esquire Ruden McClosky Smith Schuster & Russell, PA Tampa, Florida Re: Economic Damages / Personal Injury	97-08310 Circuit Court Hillsborough County Florida, Civil Division	Jennifer Smith v. Florida Health Facility, LP, d/b/a Charter Behavioral Health Systems of Tampa Bay, Inc.
Mr. Ernest J. Marquart, Esquire Shumaker Loop & Kendrick, LLP Tampa, Florida Re: Inventory Valuation	96-2537-CIV-T-23A District Court Hillsborough County Tampa Division	Home Shopping Network, Inc. v. Central Transport, Inc.
Mr. Christopher S. Knopik, Esquire Yerriid, Knopik & Krieger, P.A. 101 East Kennedy Boulevard Suite 2160 Tampa, Florida 33602 Re: Personal Injury/ Wrongful Death	No. C198-2316 Division 33 Orange County Florida	Diane Manikowski v. Meredith Lee Scott, M.D.
Mr. Richard M. Zabak, Esquire Shackleford, Farrior, Stallings, & Evans 501 East Kennedy Boulevard Suite 1400 Tampa, Florida 33602 Re: Lender liability/economic loss	No. 95-5976-CI-011 Circuit Court Pinellas County Florida	Dianne Murcin Greene v. Southern Exchange Bank
Mr. James Kaplan, Esquire Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP 3800 NationsBank Tower 100 S.E. Second Street Miami, Florida 33131 Re: Accountants' Liability	No. 98-2958-CA Circuit Court, Fifth Judicial Court Citrus County Florida	Johnston v. Woodruff
Mr. Edward O. Savitz, Esquire Mr. Edward B. Carlstedt, Esquire Bush Ross Gardner Warren & Rudy, P.A. 220 South Franklin Street Tampa, Florida 33602 Re: Economic damages	No. 81-3325-CA-01 Circuit Court Twelfth Judicial District Sarasota County Florida	Dillin v. Bostic

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. Richard Hirsch, Esquire Levine, Hirsch, Segall & Brennan, P.A. Tampa, Florida Re: Personal Injury	98-3413 Division G Tampa, Florida Hillsborough County	Donald R. Fickey v. Cable News Network
Mr. Martin Hyman, Esquire Golenbock, Eiseman, Assor & Bell New York, New York Re: Employment damages		Bernadette Scelta v. Delicatessen Support Services, Inc., Boar's Head Provisions Co., Inc. and Robert S. Martin
Mr. Robert V. Williams, Esquire Williams, Reed, Weinstein, Schifano and Mangione, P.A. Tampa, Florida Re: Wrongful death	95-6456 Circuit Court Ninth Judicial Circuit Orange County Florida	Dean Fresonke v. Prudential Health Care Plan, Inc., et al
Ms. Deborah Gander, Esquire Jobles & Gonzalez, P.A. Miami, Florida 33131 Re: Employment Damages	98-3368-CI-11 Circuit Court Pinellas County Florida	Carl Swigart and Denise Swigart v. Rebecca Appelbaum and David Appelbaum
Ms. Tammy Giroux, Esquire Shumaker, Loop & Kendrick, LLP 101 East Kennedy Boulevard Suite 2800 Tampa, Florida Re: Contract dispute	98-3701-CA Circuit Court Sixth Judicial Circuit Pasco County Florida	John L. Jennings, III v. DeLite Outdoor Advertising, LLC, et al
Ms. Marion Hale, Esquire Johnson, Blakely, Pope, Bokor 911 Chestnut Street Clearwater, Florida Re: Damage analysis	98-1392-T-23B Middle District of Florida Civil Division	Teltronics, Inc. et al. v. Kevin B. Rogers, et al.
Ms. Gretchen R. H. Vose, Esquire Vose, Blau & Hayes, P.A. 2705 West Fairbanks Avenue Winter Park, Florida Re: Contract dispute	CI 97-3575 Ninth Judicial Circuit Orange County Florida	The Strasberg Corporation v. Robert Rohdie, et al

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Robert V. Potter, Esquire Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. 911 Chestnut Street Clearwater, Florida Re: Contract dispute	97-2866-CIV-T-17B Middle District of Florida Civil Division	Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corporation
Francis J. Carroll, Esquire Boehm, Brown, Seacrest, Fischer & McFever, P.A. 220 South Ridgewood Avenue Suite 301 Daytona Beach, Florida Re: Economic damage analysis	94-32172-CIC Circuit Court Seventh Judicial Circuit Volusia County Florida	Howard T. Paul and Nancy A. Paul, et al v. American Financial, et al
Christopher S. Knopik, Esquire Knopik Krieger 406 South Morgan Street Tampa, Florida Re: Contract dispute	99-1550-Civ-T-26A District Court Middle District of Florida Tampa Division	L.C. Hicks, Jr. v. Merkert American Co., Inc.
Melanie J. LaFond, Esquire Zinober and McCrea, P.A. 201 East Kennedy Boulevard Suite 850 Tampa, Florida Re: Contract dispute/ fraud Investigation	98-2143-CIV-T-25E District Court Middle District of Florida Tampa Division	America II Electronics, Inc. v. Access International, et al
David R. Atkinson, Esquire Gunster Yoakley & Stewart, P.A. 777 South Flagler Drive Suite 500 East West Palm Beach, Florida Re: Accountants' Professional Conduct	93-07804 7 th Judicial Circuit Circuit Court Broward County Florida	BankAtlantic v. Ernst & Young

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Mr. Frank Winkles, Esquire Swope Law Group 777 Harbour Island Boulevard South Tampa, Florida Re: Personal injury	99-2552CIV-T-25A District Court Middle District of Florida Tampa Division	John A. Tedesco v. The Paul Revere Life Insurance Company
Mr. Aubrey Dicus, Esquire Battaglia, Ross, Dicus & Wein, P.A. 980 Tyrone Boulevard St. Petersburg, Florida 33743 Re: Contract dispute	96-6070-CI-11 Circuit Court Sixth Judicial Circuit Pinellas County Florida	David S. Goldman v. Acrosonic Corporation
Mr. A. Christopher Kasten, Esquire Allen, Dell, Frank & Trinkle, P.A. 101 East Kennedy Boulevard, Suite 1240 Tampa, Florida 33602 Re: Contract/trade secret damages	96-4784 Circuit Court Thirteenth Judicial Circuit Hillsborough County Florida	Miami Transfer Company Inc., v. Jeffrey Nutting and Sunbelt Sales & Rentals, Inc.
Mr. Stephen Segall, Esquire Levine, Hirsch, Segall & Brennan 100 South Ashley Drive, Suite 1600 Tampa, Florida 33602 Re: Personal Injury	97-001935 Circuit Court Thirteenth Judicial Circuit Hillsborough County Florida	Williams, et al v. Zaborske and Ford Motor Company, et al
Mr. Eric D. Cohen, Esquire Welsh & Katz, Ltd. 120 South Riverside Plaza 22 nd floor Chicago, Illinois 60606 Re: Trademark	8:00CV473-T-24F District Court Middle District of Florida Tampa Division Florida	Del Webb Corporation v. Watermark Communities, Inc. et al
Mr. Stephen J. Wein, Esquire Battaglia, Ross, Dicus & Wein 980 Tyrone Boulevard St. Petersburg, Florida 33743 Re: Patent Infringement	98-2175-CIV-T-23E District Court Middle District of Florida Tampa Division Florida	TSE Industries, Inc. v. Franklynn Industries, Inc.

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Ms. Gretchen R. H. Vose, Esquire Vose & Blau, Attorneys at Law 2705 West Fairbanks Avenue Winter Park, Florida 32789 Re: Economic Damage Analysis	98-CI-1421 Circuit Court Ninth Judicial Circuit Osceola County Florida	Cecile Resort, Ltd., Euramerican Investment Consultants, Corp. v. Residence Inn by Marriott International, Inc.
Mr. Stephen L. Segall, Esquire Levine, Hirsch, Segall & Brennan, P.A. 100 South Ashley Drive Suite 1600 Tampa, FL 33601 Re: Personal Injury	99-919-CIV-T-17F District Court Middle District of Florida Tampa Division Florida	Simon L. Pratt and Chiffon M. Pratt v. Ricky J. Wedig and Wel Companies, Inc.
Ms. Jean Frances Niven, Esquire Gunn Merlin, P.A. 601 S. Bayshore Boulevard Suite 800 Tampa, FL 33606 Re: Economic Loss	98-4392, Division J Circuit Court Thirteenth Judicial Circuit Hillsborough County Florida	Leonard Nichols, Inc. v. Nationwide Mutual Insurance
Mr. Paul Egtvedt, Esquire Goldsmith & Associates, Ltd. 920 Midwest Plaza East 800 Marquette Avenue Minneapolis, Minnesota 55402 Re: Employment matter	99-1569-CIV-T-17B District Court Middle District of Florida Tampa Division Florida	Surget U. Doss v. International Brotherhood of Teamsters, etc., et al.
Don Greiwe, Esquire Cunningham, Clark & Greiwe, P.A. 100 South Ashley Drive, Suite 100 Tampa, Florida 33602 Re: Wrongful Death	99-0920 Division I Circuit Court Thirteenth Judicial Circuit Hillsborough County Florida	Todd Anderson v. Robert Rosequist, M.D., Kim Cole, P.A.-C., and Family Care of Land O'Lakes, P.A.
Edward M. Waller, Esquire Fowler, White, Boggs & Banker 501 East Kennedy Boulevard, Suite 1700 Tampa, Florida 33601 Re: Contract damages	American Arbitration Case No. 32 Y 193 0001700	Medcenter Diagnostics, Inc. vs. Lawnwood Medical Center, Inc., et al

STEVEN S. OSCHER
OSCHER CONSULTING
LITIGATION BACKGROUND (Continued)

Exhibit II (cont.)

<u>FIRM</u>	<u>CASE NUMBER</u>	<u>CASE NAME</u>
Frank Winkles, Esquire Swope Law Group 1234 5 th Avenue East Tampa, Florida 33605 Re: Personal injury	97-007877-CI-7 Circuit Court Sixth Judicial Circuit Pinellas County, FL Civil Division	Edwin Andres and Linda Andres v. Buccaneer Steel Erectors Inc., et al
Wil Florin, Esquire Florin, Roebig & Walker, P.A. 777 Alderman Road Palm Harbor, Florida 34683 Re: Wrongful termination	6:00-CV-1542-ORL-158B District Court Middle District of Florida Orlando Division	Thiruchelvam, Morillo- Azcuay, Krishnan, Sessoms, Joseph, Thakkar, Luna, and Dominguez v. Metcare of Florida
C. Philip Campbell, Esquire Shumaker, Loop & Kendrick 101 East Kennedy Boulevard Tampa, Florida 33602 Re: Contract dispute	CL 00 5856 AB Circuit Court 15 th Judicial Circuit Palm Beach County, Florida	Choice Restaurant Acquisition, Ltd. V. Whitley, Inc., et al
Glen Rafkin, Esquire Greenspoon, Marder, Hirschfeld, Rafkin, Ross & Berger, P.A. 100 West Cypress Creek Road, Suite 700 Fort Lauderdale, Florida 33309 Re: Contract dispute	8:98-Civ-1150-T-MAP Middle District of Florida Tampa Division	Vacation Break U.S.A., Inc. v. Marketing Response Group & Laser Company, Inc.

STEVEN OSCHER, 9/27/02

<p>IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO NO. CIV-01-1124 WME/RLP</p> <p>TEAM TIRES PLUS, LTD., a Minnesota corporation,</p> <p>Plaintiff,</p> <p>vs.</p> <p>TIRES PLUS, INC., a New Mexico corporation,</p> <p>Defendant.</p> <p>DEPOSITION OF STEVEN S. OSCHER September 27th, 2002 9:15 a.m. 101 Third Street, Northwest, Suite 2800 Albuquerque, New Mexico 87102</p> <p>FURTHER TO THE FEDERAL RULES OF CIVIL PROCEDURE, this deposition was:</p> <p>TAKEN BY: MR. TRAVIS R. COLLIER ATTORNEY FOR DEFENDANT</p> <p>REPORTED BY: MICHELLE TRUJILLO, CCR No. 116 Kathy Townsend Court Reporters 110 Twelfth Street, Northwest Albuquerque, New Mexico 87102</p>	<p>EXHIBITS</p> <p>OSCHER EXHIBIT:</p> <p>72. Notice to Take Deposition Duques Tatum 8</p> <p>73. Letter dated 9/16/02 to Mr. Morgan from Mr. Thompson 9</p> <p>74. Report sent by Oscher Consulting 10</p> <p>75. Two handwritten pages, beginning with "T. Tire Cost - (y)" 11</p> <p>76. Group of documents produced to Mr. Oscher, including financial information 11</p> <p>77. Team Tires Plus, Ltd., Economic Damage, and Taxes Plus, Inc., ("TEI"), Annual Revenue, with red markings 13</p> <p>78. Index copy of yellow stickie 48</p> <p>79. Index copy of yellow stickie 48</p> <p>80. Copy of Exhibit 75 handwritten pages with new calculations 48</p>
<p>APPEARANCES</p> <p>For the Plaintiff:</p> <p>SHUMAKER, LOOF & KENDRICK, L.L.P. Attorneys at Law Bank of America Plaza, Suite 2800 101 East Kennedy Boulevard Tampa, Florida 33602 By: MR. C. PHILIP CAMPBELL, JR.</p> <p>For the Defendant:</p> <p>GODEY, DICKASON, SLOAN, AKIN & ROBB, P.A. Attorneys at Law 701 Third Street, Northwest, Suite 2800 Albuquerque, New Mexico 87102 By: MR. TRAVIS R. COLLIER MR. MATTHEW WERDAGER</p> <p>Also Present:</p> <p>Mr. Donald Leonardi Mr. Bruce Halott</p> <p>INDEX</p> <p>STEVEN S. OSCHER PAGE</p> <p>Direct Examination by Mr. Collier 4</p> <p>CERTIFICATE OF COMPLETION OF DEPOSITION 129</p> <p>SIGNATURE/CORRECTION PAGE 131</p>	<p>STEVEN S. OSCHER</p> <p>after having been first duly sworn under oath, was questioned and testified as follows:</p> <p>DIRECT EXAMINATION</p> <p>BY MR. COLLIER:</p> <p>Q. Good morning, Mr. Oscher. Is that a correct pronunciation of your name?</p> <p>A. It is, sir.</p> <p>Q. As you know, we're here for your deposition this morning. My name is Travis Collier. I represent the defendant in this case, and I'm going to try to refer to both parties as just the plaintiff and the defendant, for the ease of use here.</p> <p>I take it you've given many depositions. Is that correct?</p> <p>A. Yes, sir.</p> <p>Q. And you sort of know the lay of the land, if you will?</p> <p>A. I hope so, yes, sir.</p> <p>Q. If I should ask you anything you don't understand, please let me know so that we make sure your answers are accurate, all right?</p> <p>A. Yes, sir.</p> <p>Q. When were you first engaged in this matter?</p> <p>A. I'm trying to think.</p>

KATHY TOWNSEND COURT REPORTERS (505) 243-5018
110 TWELFTH STREET, NORTHWEST, ALBUQUERQUE, NM

EXHIBIT

3

STEVEN OSCHER, 9/27/02

<p>33</p> <p>1 this morning, I'll mark as Exhibit 77. 2 (Oscher Exhibit 77 marked.) 3 Q. Can you tell me what Exhibit 77 is? 4 A. Yes, sir. As a result of the work on the 5 analysis that I did, after I received the information 6 from Mr. Slattery, I went back and reviewed the damage 7 calculations that had been prepared in the report, in 8 Exhibit IV and Exhibit V, and I modified the numbers, the 9 percentages, for what I learned from my discussion with 10 Mr. Slattery. 11 Q. And we'll get back into that momentarily. 12 A. Okay. 13 Q. Have you reviewed any franchise agreements or 14 sample franchise agreements in coming to your conclusions 15 in this case? 16 A. I've reviewed the agreements, certainly. 17 Q. Did you bring those with you here today? 18 A. No, I think they were part of the packet of 19 information that I thought had been received by you. 20 Q. I have not received any franchise agreements 21 within Exhibit 73. 22 A. No, as I was saying, they were part of -- part 23 of the original documents that were considered for my 24 report that I understood you and Mr. Tinkerman had 25 discussed.</p>	<p>35</p> <p>1 A. I've never spoken with Mr. Morgan. 2 Q. I take it you don't know Mr. Morgan? 3 A. I don't know Mr. Morgan, no, sir. 4 Q. Has your firm ever done any work with any of 5 Mr. Morgan's enterprises? 6 A. Is Mr. Morgan associated with anything other 7 than tires? 8 Q. Not that I know of. 9 A. Then I'm not sure -- I'm not aware of any other 10 thing that I've ever done with him. 11 Q. Let me have you turn your attention to page 12 four of your report. 13 A. Okay. 14 Q. This is where you list your findings. First of 15 all, your report says that it's your understanding that 16 the defendant was informed in 1994 that it was wrongfully 17 using the service mark Tires Plus, and I take it that's 18 information someone else gave to you? 19 A. It may have been from the complaint that I took 20 that. 21 Q. You, yourself, haven't been asked to review the 22 trademarks or make any determination as to who is right 23 or wrong in this case from that aspect, have you? 24 A. No, sir. 25 Q. You've been asked to come up with some type of</p>
<p>34</p> <p>1 Q. So some of the original -- they should be 2 listed within your report, then, as having been reviewed 3 by you. Is that what you're saying? 4 A. I believe so, yes, sir. Now, if they're not 5 there, they may -- I mean, if it's not specifically laid 6 out, they may have been an attachment, an exhibit 7 attachment to some other document. 8 Q. Do you advertise your services anywhere? 9 A. We have a website. I don't know if you would 10 refer to that as advertising. There's a newsletter that 11 comes out every two months, six times a year. I don't 12 know if you call that advertising. 13 In Hillsborough County, there is a bar journal. 14 At different times, I've had an ad that you would 15 probably call advertising. 16 Q. What bar journal is that? 17 A. It's the county bar. 18 Q. Hillsborough County, is that where Tampa is 19 located? 20 A. That's correct, sir. 21 Q. Any other advertising that you've done in the 22 last five years, say? 23 A. Not that I can think of, no, sir. 24 Q. Have you ever spoken with Larry Morgan about 25 this case?</p>	<p>35</p> <p>1 damage analysis, assuming the jury finds that to be the 2 case? 3 A. That's correct, sir. 4 Q. It states, "We have requested financial 5 statements and tax returns for TPI." Who did you make 6 that request of? 7 A. Mr. Tinkerman. 8 Q. When did you make that request? 9 A. Right after we became involved, after the 10 engagement. 11 Q. In July of 2002? 12 A. Yes, sir. 13 Q. What did Mr. Tinkerman tell you? 14 A. That the redacted information that I received 15 was the only thing in the way of information that had 16 been produced. 17 Q. Then you state, "Without the Defendant's 18 specific financial information, we have utilized 19 published studies," and is that the RMA that you're 20 referring to? 21 A. That's correct, sir. 22 Q. Generally speaking, if you'd had the 23 defendant's specific financial information, would that 24 have been a better source for trying to determine the 25 defendant's profits?</p>

STEVEN OSCHER, 9/27/02

37

1 A. If I had had complete financial information, it
2 would certainly have allowed me to consider the
3 information more completely than I did, yes, sir.

4 Q. In fact, that would be your primary source for
5 determining the defendant's profits, would it not?

6 A. The actual financial statements?

7 Q. Yes, sir.

8 A. That would always be so.

9 Q. Did you utilize any published studies besides
10 RMA?

11 A. No, sir.

12 Q. I guess, for purposes of the record, would you
13 identify what RMA is?

14 A. Well, it used to stand for Robert Morris
15 Associates, but I think it's taken on a different -- the
16 acronym stands for something else other than Robert
17 Morris Associates today.

18 Q. Would you tell me how you determined the
19 defendant's profits?

20 A. What I tried to do was find where there might
21 have been some published information relative to a tire
22 store operation that also had a service operation, repair
23 operation, associated with it. I didn't find any
24 published studies on point to that topic.

25 What I wanted to then do was find something

38

1 that I thought could be close to the issue, and by going
2 to these published studies, I was able to take a look at
3 a tire operation, and that's why there's actually two
4 different studies here, the first being "Retail - Tires &
5 Tubes," and the other would be "General Automotive Repair
6 Shops."

7 What I did was, in taking the profit
8 information off of this study or these studies and then
9 adjusting for what I believe -- from the redacted sales
10 information that I received from Mr. Leonard's operation,
11 the defendant's operation, I determined that about 60
12 percent of his sales were tire-related and 40 percent
13 were repair-related, and I put that percentage to the
14 profit percentages from here, and that's how I came up to
15 the 3.3 percent.

16 Q. Do you have any concerns about relying on that
17 RMA information in trying to make a profit calculation?

18 A. No, I think that what -- if I could get it back
19 for a second --

20 MR. MALOTT: I'm sorry.

21 THE WITNESS: Thanks, Bruce.

22 The studies that they have done here involved,
23 at different points in time, well over 100, over 150
24 different tire stores, retail tire stores, and similarly,
25 for the auto repair shops, it was well over 300, 350

39

1 stores for the repair shops.

2 So the accumulation of data seemed to come from
3 enough different places that -- using it as a benchmark
4 was something I had done in other cases and I believed
5 that it was reasonable and appropriate.

6 Q. Are you aware of any concerns that RMA itself
7 has expressed about the use of its data?

8 A. Well, they make a statement that it is not to
9 be used because they're not giving any reliance to it.

10 The fact that RMA has put out these published
11 studies, it is commonly used in terms of just doing what
12 I'm doing and setting a benchmark. Nobody is saying that
13 this is the way it actually is. It's just trying to give
14 the user of information the ability to see what the
15 industry may or may not be doing.

16 Q. Right. It's just a general guideline. If you
17 will?

18 A. Oh, absolutely.

19 Q. It certainly is not meant to be a specific
20 accounting of what Don Leonard made or did not make in
21 his business?

22 A. No, it couldn't be that. It's just to give me,
23 as a provider of what I think is reasonable information,
24 a benchmark, and that's how I've used it.

25 Q. And you're aware that there are concerns that

40

1 the information may not be accurate because of geographic
2 considerations, size of business, a whole host of
3 factors?

4 A. Well, on size of business, they actually try to
5 help you. You're perhaps correct about geographics, but
6 the study tends to break down the size of -- and sales
7 volume of different-size operations, so that, by itself,
8 is not an issue.

9 Q. RMA believes it's an issue, don't they?

10 A. No. Otherwise, they wouldn't have -- I don't
11 believe they -- they would not have set out, you know,
12 that we're dealing with stores and sales volumes of
13 different sizes.

14 Q. Would it be fair to state that you can't take
15 the RMA data and conclude that, because another -- an
16 individual business is different, had different profit or
17 loss, that they're necessarily not reporting their profit
18 and loss accurately?

19 A. I don't know that I understand what you just
20 asked me.

21 Q. You're not saying that you can use the RMA data
22 and compare it to an individual business, such as Mr.
23 Leonard's, and come to the conclusion that the reports of
24 Mr. Leonard are inaccurate?

25 In other words, RMA might give you a conclusion

STEVEN OSCHER, 9/27/02

<p>41</p> <p>1 that there's, across the board, a three-percent profit.</p> <p>2 That doesn't mean, if Mr. Leonard reports a loss, that</p> <p>3 his reports are not accurate?</p> <p>4 A. Your last statement is a true statement. Your</p> <p>5 other question, the answer to it is: I don't know.</p> <p>6 When I start an investigation, one of the first</p> <p>7 barometers I look at is as to, "What do I expect?" and</p> <p>8 RMA or any industry publications are the first source</p> <p>9 that I go to. If things seem to tie in, then at least it</p> <p>10 gives me some understanding of the business operation.</p> <p>11 Q. But the primary source that you would look at</p> <p>12 to determine if Mr. Leonard was profitable or not would</p> <p>13 be his own financial statements?</p> <p>14 A. Certainly, his financial statements are the</p> <p>15 first source of information, the detail of his</p> <p>16 accounting, yes, sir.</p> <p>17 Q. Have you undertaken any review of his financial</p> <p>18 information in determining his profits?</p> <p>19 A. I have not done a study on his information, no,</p> <p>20 sir.</p> <p>21 Q. Have you been given a copy of Mr. Malott's</p> <p>22 report and attachments?</p> <p>23 A. Yes, sir.</p> <p>24 Q. When did you receive that?</p> <p>25 A. Probably a couple of weeks ago.</p>	<p>43</p> <p>1 records.</p> <p>2 Q. But that's information that you requested</p> <p>3 Mr. Timmerman to give to you at one point, right?</p> <p>4 A. Yes, sir.</p> <p>5 Q. But you haven't looked at that since you've</p> <p>6 received it?</p> <p>7 A. No. I looked at the information that was</p> <p>8 contained in Mr. Malott's report. My comment spoke to</p> <p>9 what the underlying information that made up those</p> <p>10 numbers that were reported, either on the compiled</p> <p>11 financial statements or on the tax returns, was.</p> <p>12 Q. But you haven't used Mr. Leonard's numbers or</p> <p>13 come up with a profit or loss number?</p> <p>14 A. Well, I did use his sales numbers. It was that</p> <p>15 redacted information that we initially received.</p> <p>16 Q. But you didn't use his expense numbers?</p> <p>17 A. I didn't have his expense numbers.</p> <p>18 Q. You had them as of two or three weeks ago is</p> <p>19 that correct?</p> <p>20 A. Two or three -- again, as I'm saying, when I</p> <p>21 looked at the information, I didn't -- it called into</p> <p>22 question the reliability of the information, and I didn't</p> <p>23 see, at that point in time, the need to make any</p> <p>24 modification of my numbers.</p> <p>25 Q. Would you agree with me, if a jury finds that</p>
<p>42</p> <p>1 Q. Were you aware that Don Leonard's specific</p> <p>2 information was contained as exhibits to Mr. Malott's</p> <p>3 report?</p> <p>4 A. It wasn't contained as specific information.</p> <p>5 It was certain financial statements and tax returns.</p> <p>6 Q. Right, but the specific information concerning</p> <p>7 the expenses for Mr. Leonard's business were set out in</p> <p>8 exhibits to Mr. Malott's report, were they not?</p> <p>9 A. Well, Mr. Malott copied, or people in his</p> <p>10 office copied, information that was picked up off of</p> <p>11 financial statements or tax returns. I mean, that's my</p> <p>12 understanding.</p> <p>13 Q. Did you make any effort to try to determine</p> <p>14 Mr. Leonard's profits and losses using that material?</p> <p>15 A. Other than raising questions because things</p> <p>16 certainly seemed out of order, I didn't do anything more</p> <p>17 than that at this time, no, sir.</p> <p>18 Q. But you would agree with me that that's a</p> <p>19 better indication of what his profits and losses would be</p> <p>20 as compared to the RMA information?</p> <p>21 MR. CAMPBELL: Objection, vague.</p> <p>22 A. I don't know that I -- again, I don't know what</p> <p>23 I don't know, because I haven't done anything to truly</p> <p>24 look at the underlying issues that relate to the expenses</p> <p>25 or the sales that Mr. Leonard reported on his financial</p>	<p>44</p> <p>1 Mr. Leonard's numbers are reliable, that Mr. Leonard's</p> <p>2 operation would not have made a profit over the years</p> <p>3 that you've looked at?</p> <p>4 A. I'm hesitating, because I don't know how you're</p> <p>5 defining as "profit." If you could help me with that,</p> <p>6 then I'd like to answer your question.</p> <p>7 Q. Well, let me ask you how you define "profit."</p> <p>8 A. I define it as the appropriate business</p> <p>9 expenses taken away from appropriate, properly recorded</p> <p>10 business revenue.</p> <p>11 Q. If you were to assume, first of all, that all</p> <p>12 of Mr. Leonard's income and expenses were appropriately</p> <p>13 recorded, as given to you in the Malott information,</p> <p>14 would you agree with me, over the years that you've</p> <p>15 looked at, that his firm has not had a profit?</p> <p>16 A. If they were reasonable and appropriate --</p> <p>17 again, I -- what's -- I don't know how to answer that</p> <p>18 question, and I'm not trying to be evasive, but I'm just</p> <p>19 simply saying that, you know, without going in and -- for</p> <p>20 example, I understand that there's personal expenses that</p> <p>21 Mr. Leonard has acknowledged are recorded in there.</p> <p>22 I don't know whether those are meaningful or</p> <p>23 not. I know Mr. Malott testified yesterday that he asked</p> <p>24 the question and that he was told that they weren't, but</p> <p>25 I don't know that Mr. Malott or the people in his office</p>

STEVEN OSCHER, 9/27/02

57

59

1 Q. Now, you stated, when you looked at Don's
2 financials, that you had some questions. What types of
3 questions do you have?

4 A. Well, I think the questions were the same as
5 Mr. Malott said yesterday when he testified, that it's
6 difficult to understand a business that has been
7 operating for 16 years where, in 14 of those years, there
8 are losses, continuing losses.

9 Q. I'm not sure if Mr. Malott said that or Mr.
10 Campbell said that, but my question for you is: Besides
11 the fact that his financials show a loss for 14 of 16
12 years, do you have any other concerns about the
13 appropriateness of his financials, as reported?

14 A. I think everything that I may have as a concern
15 stems from that very fact that, after 16 years, he's able
16 to put money into the business only to continue to
17 generate losses. That's not a normal business scenario
18 that I'm accustomed to seeing.

19 Q. Have you seen that in connection with
20 family-owned businesses before, even though you don't
21 personally agree with it, that some people still hang on
22 to their family businesses?

23 A. I was trying to think when I've seen that, and
24 listening to the testimony yesterday from Mr. Malott, I
25 can't think of a situation that I've seen like this in my

1 million dollars back into this business to continue to
2 generate losses, as he has for 14 of 16 years, I don't
3 understand that. It's just not something, in my
4 accounting experience, that I've seen in a retail
5 operation like this, even a small, family-owned business,
6 if you will.

7 So to pursue any additional questions, I guess
8 I just haven't really thought about it, because, at the
9 time, I was just trying to gain an understanding for what
10 all that information related to.

11 Q. And I guess that's my question. Besides the
12 fact that he's generated losses over a lengthy period of
13 time, you've not done any analysis or ratios or
14 calculations whatsoever to support your conclusions that
15 make you suspicious?

16 A. I have not.

17 Again, the question that I was asked -- or that
18 I wasn't asked, but -- one of the questions that I had
19 related to the reporting of sales, for example, and how
20 they had recorded sales, as they had here, on Oscher
21 Exhibit Number 7. The rest of the information was
22 redacted, but they gave information with regards to the
23 detail of the sales.

24 In Mr. Malott's report, while he was given more
25 financial information, information relating to sales and

58

60

1 work experience.

2 Q. You haven't done any analysis at all to
3 determine whether or not the actual reporting is accurate
4 or not, have you, by Don Leonard?

5 A. Well, I was waiting to hear. That's why I came
6 to the deposition yesterday, to hear what work had been
7 done by Mr. Malott. I have not done anything at the
8 moment.

9 Q. So as we sit here today, you can't say one way
10 or the other that the reporting done by Mr. Leonard is
11 inappropriate or fraudulent or misrepresentative in any
12 nature?

13 A. I can only tell you that I don't know. It
14 appears very suspicious. Beyond that, I don't have any
15 other comment.

16 Q. Besides the fact that he's reported a loss, is
17 there anything else that is suspicious about it to you?

18 A. I think everything falls under that umbrella.

19 Q. Can you tell me what it is, besides the fact
20 that he's reported a loss, that tells you that it's a
21 suspicious reporting?

22 A. Again, I'm sorry, I guess I'm not making myself
23 clear.

24 In looking at the fact that the businesses have
25 continued to operate and the fact that he has put over a

1 information relating to purchases, cost of sales, were
2 just given to him as a single line item that he reported.

3 I either was hoping to hear that he had more
4 information, but I didn't -- I didn't hear -- I didn't
5 see it, and so I can't answer the question.

6 That would be one of those areas, in terms of
7 trying to line up the appropriateness of the purchases,
8 the cost of sales, but I don't know where the information
9 is, sir.

10 Q. So I take it the answer to my question is: You
11 have not done any type of comparative analysis or any
12 accounting work whatsoever to show that these statements
13 are, indeed, inappropriate or misrepresentative or
14 fraudulent. Is that a fair statement?

15 A. I have not done that. That's correct, sir.

16 Q. And you don't have any opinion on that, then --

17 A. I do have an opinion.

18 Q. But -- well, let me finish my question.

19 A. I'm sorry.

20 Q. You don't have any opinion on it, with the
21 exception of you think it's suspicious that a business
22 would go 14 years without a profit?

23 A. I think it's suspicious, that's correct, sir.

24 Q. But besides the fact that he hasn't made a
25 profit, you don't have any other information to base your

STEVEN OSCHER, 9/27/02

61

63

1 suspicion upon?

2 A. I don't know how to answer your question,
3 again, because you changed the way you asked it.

4 To the extent that I had information in a
5 redacted form for the detail of sales that subsequently
6 wasn't produced in that same format to Mr. Malott and
7 that missing from that was information relating to
8 purchases, there would certainly be a suspicion that
9 maybe there's something in there that, you know, may
10 provide some additional avenue of pursuit.

11 So there is something specific, at least from
12 my initial look at it, but have I been able to do that?
13 No, sir, I haven't.

14 Q. Do you know under what circumstances the
15 redacted information was produced that would cause a
16 suspicion in your mind, and do you know that the
17 suspicious information was even asked for or -- in the
18 form you're talking about?

19 A. You asked me that question earlier with regards
20 to a statement that I made in my report about requesting
21 information and receiving redacted information. All I
22 did was ask Mr. Timmerman if additional information was
23 produced, and he said, "No, it was produced in the form
24 you saw."

25 It wasn't until I saw it a few weeks ago, or in

52

1 the last few weeks. Mr. Malott's report, where it became
2 obvious that he had more information to deal with. He
3 just didn't have even this detail of information that had
4 been produced.

5 Q. Did Mr. Timmerman tell you whether or not he
6 made any effort to obtain the information that you
7 requested in July of 2002 after you requested it?

8 A. I made the request. He said it had been asked
9 for and this is what was produced. I have no additional
10 information beyond that, sir.

11 Q. For how long a period of time do you think a
12 reasonable business would continue to operate at a loss
13 before they, what, shut it down or whatever?

14 A. I don't know that I have a perspective on what
15 a reasonable time would be.

16 Q. Well, sir, you've told me that you're
17 suspicious because Donnie operated with a loss.

18 A. Yes.

19 Q. So can a reasonable business operate with a
20 loss over a number of years without generating a
21 suspicion?

22 A. Well, again, from the perspective of cash flow
23 and what cash flow may mean and how cash flow may be
24 derived, or to the extent that there are expenses being
25 used from the business or payments that may be going

1 other places that have no impact on the business, to keep
2 the business operating, you know -- I mean, there's,
3 frankly, no telling how long somebody may or may not
4 choose to keep the business going.

5 My response about the questions and suspicions
6 I was having merely had to do with the fact, if
7 everything is purely this business, that this just
8 doesn't seem logical, that you would continue to incur
9 these losses.

10 Q. You can't think of a business reason for it, is
11 that what you're telling me?

12 A. I don't know of a business reason.

13 Q. How long would any reasonable business continue
14 to incur losses before shutting it down?

15 MR. CAMPBELL: Objection, speculation, lack of
16 predicate, foundation.

17 MR. COLLIER: I'll agree, it's speculative.

18 Q. Is that your testimony, also, sir?

19 A. What, that how long a business would continue
20 with losses is speculation?

21 Q. Well, before they shut it down and continue to
22 -- do you have a feel for how long is too long so that a
23 suspicion is raised?

24 A. I think there's a number of motivating factors.
25 Is there an expectation that there may be profits at some

64

1 point?

2 Q. All right.

3 A. I mean, there are all sorts of individual
4 factors that would possibly come into play.

5 Q. What are some of the other factors?

6 A. I can't think of anything else at the moment.

7 Q. So you can't give me an exact number of years,
8 then, that a business will operate at a loss before it
9 becomes suspicious to you?

10 MR. CAMPBELL: Objection, mischaracterizes his
11 prior response and responses.

12 Q. I don't mean to mischaracterize anything. Is
13 there a figure, sir?

14 A. I don't think there's any specific figure, no.

15 Q. Have you been asked to do any further work in
16 following up on your suspicions?

17 A. Not at the moment.

18 Q. Do you intend to do any, unless you're asked?

19 A. If I'm asked, I will certainly do it.

20 Q. And if you do additional work, I would
21 appreciate it if you would let Mr. Campbell know so he
22 can let me know. Is that acceptable to you?

23 A. I will gladly have Mr. Campbell inform you of
24 anything that I do.

25 Q. In determining this first section of your

STEVEN OSCHER, 9/27/02

77

79

1 You're absolutely right, I would want to check
2 it out further.

3 Q. Anything besides that?

4 A. Well, it would probably depend on what those
5 results are before I pursued it further.

6 Q. Would that raise a concern in your mind that
7 they shouldn't be operating those businesses any longer
8 because they've been unprofitable since 1997?

9 A. Again, I think you're matching apples and
10 oranges as a franchisor operates, but from the
11 perspective of if there are continuing losses, then I
12 would certainly want to inquire further.

13 Q. If you assume that their operation of their
14 same-store businesses over the years, since 1997, has
15 been unprofitable, yet their bottom line is showing a
16 profit, would it be fair to say that they're making their
17 profit off the franchise fees?

18 A. No. No, sir.

19 Q. Do you have any other idea what their stream of
20 income is for the plaintiff here besides their own
21 company stores and franchise fees?

22 A. I think they had some wholesale operations, as
23 well.

24 Q. Do you know what percentage of their sales is
25 wholesale?

78

80

1 A. Again, I haven't done anything other than look
2 at the franchisee issue.

3 Q. What did you rely on or use these reports for
4 that are in front of you?

5 A. What I was trying to do was utilize the
6 reports, as I think I said earlier, for three issues: As
7 it related to tire cost, amount of tires purchased by the
8 franchisee from the franchisor, and then a margin of
9 profit that the franchisor was making on franchisee tire
10 sales, which are those three numbers that -- percentages
11 you were asking me about.

12 Q. Let's turn to that, then, and let's look at
13 what you did to, first of all, determine the 70 percent
14 number.

15 A. Are we finished with these?

16 Q. Well, my assumption is you're going to need
17 them to help me with --

18 A. Okay.

19 Q. I guess we're on Exhibit IV of your report,
20 which deals with inventory markup.

21 A. Do you have the revised IV or --

22 Q. I don't have that in front of me, but --

23 A. The exhibit that's Exhibit 77.

24 Q. All right. Exhibit 77.

25 A. Okay, sir.

1 Q. First of all, tell me -- I understand, in your
2 initial Exhibit IV, those figures were derived from what
3 Todd Zimmerman had given you, and then, since then,
4 you've revised those numbers. Is that accurate?

5 A. There's two columns, one that says "Total
6 Sales," and the other one says "New Tire Sales." Which
7 column are you dealing with?

8 Q. Well, we've covered, have we not, the left-hand
9 column?

10 A. Yes, sir.

11 Q. Let's go to the right-hand column.

12 A. Okay.

13 Q. Down at the bottom, it says "Inventory Markup."

14 A. Yes, sir.

15 Q. Tell me how those numbers were derived, under
16 the revised Exhibit 77.

17 A. If I can help you, Exhibit 75, that was a
18 document that I was referring to earlier that we'll send
19 you a typed form of, but these were the steps that I used
20 in looking at these financial reports from Team Tires,
21 the documents that we've been referring to, in going
22 through them to pull out the certain costs that are the
23 original 70 percent, 85 percent and eight percent, and
24 now the revised totals that appear on Exhibit IV.

25 Q. So let's take the first number, 76.8 percent.

1 A. Okay, sir.

2 The first issue that I had had to do with tire
3 cost, and for the 1997 report, I have some copies. Do
4 you want yours from the exhibits?

5 Q. I've got an extra set. I hope, here. If you'll
6 just tell me the Oscher page number, I think I'll be able
7 to follow you.

8 A. All right. If you will tell me the Oscher
9 number, because mine don't -- weren't Bates numbered.

10 Q. Oh, all right.

11 MR. COLLIER: Well, off the record for a
12 moment.

13 (Off-the-record discussion.)

14 Q. Okay. Back on the record.

15 A. If you go to Oscher Bates number 24 -- are you
16 there, sir?

17 Q. Yes.

18 A. If you look at the right-hand column that says
19 "Year-to-Date" and if you take the -- in the right-hand
20 column "Year-to-Date," you take the fourth column across,
21 which is a percentage column, and then you look to the
22 bottom of the second grouping of numbers, you see a total
23 tire margin of 23.3 percent.

24 Q. All right.

25 A. The reciprocal of that is the 76.7 percent that

STEVEN OSCHER, 9/27/02

81

1 appears on -- I forget the exhibit number.
 2 Q. Exhibit 75.
 3 A. Yes, sir. It's this number right here, all
 4 right?
 5 Q. All right.
 6 A. For the other internal reports, I've taken that
 7 same number across to determine what their profit margin
 8 is on tire sales, and that's where I've derived the 75.7,
 9 the 75.6, 76.8, the 77.1 percent, to come to this
 10 four-year average, which is really a three-and-a-half-
 11 year, if you will, of 76.8 percent that's used in my
 12 report.
 13 Q. Okay. I understand that.
 14 A. Good. Do you want to go to the next
 15 percentage?
 16 Q. I think so.
 17 MR. COLLIER: Just off the record for a minute.
 18 (Off-the-record discussion.)
 19 Q. Let's go to the next one, Roman numeral II on
 20 Exhibit 75.
 21 A. Okay. The second issue was that the
 22 franchisees are not required to purchase tires from the
 23 franchisor, but that a significant percentage of the
 24 tires that have been purchased historically are being
 25 purchased from the franchisor by the franchisees, to the

82

1 tune of 85 percent.
 2 That was the original comment that was made on
 3 the original information that was given. What I then
 4 needed to find out was what percentage might that be when
 5 I looked at the information.
 6 So the first assumption or the first thing I
 7 needed to do was to find out the inventory -- well, that
 8 was the objective, to find out the inventory purchased,
 9 and I'm referring now to -- is that Exhibit 75?
 10 Q. Yes.
 11 A. Okay. Under II-A, what relationship of tire
 12 sales to total sales exists within the franchise system.
 13 So what I utilized was a -- if I can -- in the
 14 third grouping down, you see "Total Tire/Tire Related
 15 Sales" of 55 million, 55.8 million.
 16 Q. For "FY Actual," this year actual?
 17 A. Yes, sir. Right.
 18 Q. It's on Oscher 0024; is that correct?
 19 A. Yes, sir, it's the same document.
 20 Q. Okay.
 21 A. Under '97 on Exhibit 75, there's a cross-out.
 22 but do you see the 55.9 as the numerator?
 23 Q. Un-huh.
 24 A. The denominator -- if you look all the way to
 25 the bottom, you see total sales of 83.1 million.

83

1 Q. All right.
 2 A. That became my denominator.
 3 So for '97, my calculation was that 67.3
 4 percent of their sales volume was based on tires, and
 5 then I did the same calculation for '98, '99 and 2000
 6 for the other documents.
 7 Q. Now, how does that tell you what percentage of
 8 tires that franchisees will buy?
 9 A. If you allow me to go through the rest of it,
 10 it -- from my standpoint, it had to work in steps, and
 11 what I'm doing with, essentially, A, B and C is I'm
 12 laying a predicate for my calculation.
 13 Q. So the 67.3 percent represents what, again?
 14 The percentage of tire sales to total sales?
 15 A. That's correct, sir. Okay?
 16 Q. All right. Now, let me just ask you one thing.
 17 I'm sorry, but before I leave that --
 18 A. Yeah.
 19 Q. -- that 55 million includes not only retail new
 20 tires, but wholesale tires, used tires?
 21 A. It's everything.
 22 Q. Would you expect used tires to be sold to
 23 franchisees?
 24 A. I don't know whether they were retreads, but
 25 the answer is, again, for purposes of my calculation, it

84

1 was such an insignificant part of the tire sales that any
 2 residual difference I didn't see as making a big
 3 difference to my overall calculation.
 4 Q. All right. Go ahead.
 5 A. The second calculation was total franchisee
 6 sales, and on that number, I needed to go to Oscher Bates
 7 number 39.
 8 Q. Okay.
 9 A. I'm going to give you a specific number.
 10 Q. Ask him.
 11 A. Now, see, I don't know whether this is a --
 12 MR. COLLIER: Off the record.
 13 (Off-the-record discussion.)
 14 Q. Back on the record.
 15 A. The Bates-numbered document 39, on the far
 16 left-hand side is a number that is 26.8 million.
 17 Q. Under what column are you looking?
 18 A. I'm sorry. Let me help you here.
 19 Q. You're looking on the right-hand column --
 20 A. Yeah.
 21 Q. -- "Year-to-Date," and it says "Last Year
 22 Actual."
 23 A. So those are the total sales.
 24 Q. This is Oscher 0039.
 25 A. And I may have transposed that, because, for

STEVEN OSCHER, 9/27/02

85

1 '97, it shouldn't have been the last year. It should be
2 the slightly higher number of 29.6.

3 Q. All right. Let me just ask you this. On
4 Oscher 0039, do you have any understanding as to whether
5 or not these sales numbers are total sales of everything,
6 or just tires, or what?

7 A. It is my understanding that these are total
8 sales of everything on which the franchise fees are being
9 paid.

10 Q. Okay. Go ahead.

11 A. And that's the same for all of the stores, as
12 well.

13 The next one, item three, or C --

14 Q. Hold on just one moment.

15 (Mr. Collier confers with Mr. Malott.)

16 Q. One question on that page, 0039 --

17 A. Right.

18 Q. -- is why you didn't include the new franchise
19 stores as opposed to just the existing.

20 A. Because it was my understanding that the -- the
21 answer actually is -- and it may have been an error in my
22 calculation I did, because when I picked it up the
23 following year -- because there's a "Last Year" column.
24 The years could have slid across, and I'd have to go back
25 and make a quick recalculation.

86

1 I don't know what it's going to change in the
2 way of the numbers, but they should have included total
3 sales, tire sales.

4 Q. All right. Go ahead.

5 A. And, in fact, if I can show you for 1998 -- I
6 think it would only be '97 that would -- because, if you
7 look at 1998, the total sales from all stores for '96 are
8 the 34 million that had been recorded in total for '97.

9 Q. All right. I see what you're saying.

10 A. Okay. So it was just sliding it over a year.

11 Q. So you made the mistake? One year only, you
12 think?

13 A. Well, what it's going to do -- because it slid
14 from each year, it will affect the calculation. I don't
15 know how it will affect it in total, because when I
16 finish building the model for you, you'll see how all the
17 numbers have come together.

18 Q. All right. You're going to send me a typed
19 copy of this, then?

20 A. Yes, sir.

21 MR. COLLIER: Let's go off the record for just
22 a moment.

23 (Recess taken from 11:50 a.m. to 1:04 p.m.)

24 (Oscher Exhibit 80 marked.)

25 Q. Back on the record, Mr. Oscher.

87

1 As I understand, you've had a chance to look at
2 your numbers over the lunch period, and you've changed
3 what was previously marked as Exhibit 75 on what we'll
4 now mark as Exhibit 80. Can you tell us what you've
5 done?

6 A. Sure.

7 Prior to the break, it was -- the question was
8 raised with regard to a column for 1997, and the question
9 that was, I think, pending was why the new franchise
10 sales had not been included, and the answer was: They
11 should be.

12 I thought I had, and when I went to look at the
13 numbers, I had incorrectly put the '97 number in '96 and
14 the '98 number in '99. So I've gone back and corrected
15 that during the break.

16 Q. Okay.

17 A. The impact of that change will carry forward
18 through a couple of the other calculations that are to be
19 made.

20 Q. Before we broke, then, we were down to -- we've
21 gone through Roman numeral II-A and II-B?

22 A. That's correct.

23 Q. I think we're on Roman numeral II-C, then.

24 A. That's correct.

25 Q. If you could tell us --

88

1 A. Sure.

2 Q. -- briefly where these numbers come from.

3 A. Sure.

4 For item C, the reference point is Oscher Bates
5 number 38.

6 Q. All right.

7 A. Go ahead. If you look in the center of the
8 page, the next heading is "Franchise Operations."

9 Q. Okay.

10 A. And sales of tires and batteries is the second
11 line down. So the number that was picked up is the
12 11,583,000, and that on the schedule is 11,600,000 for
13 '97.

14 Q. Then where did you get your next number?

15 A. The 14.7?

16 Q. No, I understand that.

17 A. It's the same -- okay. Good.

18 Q. I guess it will be Roman numeral II --

19 A. D.

20 Q. -- D.

21 A. The reason for C was to understand how much the
22 -- what the tires that were being purchased from the
23 franchisor were, and that's that number.

24 So the next calculation that needed to happen
25 was to determine what the franchisee tire sales were, and

STEVEN OSCHER, 9/27/02

<p>89</p> <p>1 for 1997, in order to make that determination, I needed</p> <p>2 to take the information from B, which was franchisee</p> <p>3 sales, to that percentage which were tire sales.</p> <p>4 So by multiplying II-B by II-A, it gave me the</p> <p>5 calculation for '97 of 22.9 and the other calculations.</p> <p>6 That's just a mathematical calculation there.</p> <p>7 Q. All right. Did you say multiply or divide?</p> <p>8 A. I was multiplying -- in II-D, I was multiplying</p> <p>9 the amount of franchisee sales, because that was total</p> <p>10 sales, by that amount which were franchise sales -- or,</p> <p>11 excuse me, which were tire sales.</p> <p>12 If you remember, in A, we made an allocation</p> <p>13 for the various stores between tires and other products.</p> <p>14 Q. Well, I might be missing something here, but B</p> <p>15 is all franchisee sales.</p> <p>16 A. Right.</p> <p>17 Q. C is simply those tire purchases by</p> <p>18 franchisees.</p> <p>19 A. That's right. We'll get to C in a second, with</p> <p>20 another calculation. All I'm trying to do is put numbers</p> <p>21 in in terms of coming to a percentage, which will</p> <p>22 eventually be those -- the percentage of tires bought</p> <p>23 from the franchisor.</p> <p>24 Q. But I don't understand why you're multiplying,</p> <p>25 to tell you the truth.</p>	<p>91</p> <p>1 were made by the franchisees, there was probably less</p> <p>2 than five percent that were being used from the</p> <p>3 franchisee, and I just picked up the whole number.</p> <p>4 But when I looked at the individual items, they</p> <p>5 were not buying a lot of the parts, and when I inquired</p> <p>6 about that, not unlike the tires, the franchisees had the</p> <p>7 ability to purchase parts from other locations or from</p> <p>8 other sources other than Team Tires.</p> <p>9 Q. So you discount that as insignificant?</p> <p>10 A. Yes, sir, discount it --</p> <p>11 Q. So let's go back to Roman numeral II-E.</p> <p>12 A. What I then needed to do was, the amounts that</p> <p>13 had been calculated as far as franchisee tire sales --</p> <p>14 total, I needed to make a determination as to what the</p> <p>15 cost of those tires would have been, and I used the</p> <p>16 percentage from I, the tire cost, and I multiplied that</p> <p>17 by the franchisee cost in D, and the calculations are</p> <p>18 17.6 million in '97 and then the other amounts.</p> <p>19 Q. So you used the results of D, and you</p> <p>20 multiplied that against which section?</p> <p>21 A. The first -- on the first page, what the tire</p> <p>22 cost calculation was.</p> <p>23 Q. The 76.8 percent?</p> <p>24 A. 76.7 percent. Well, I didn't use the four-year</p> <p>25 average. I didn't get the four-year average until</p>
<p>90</p> <p>1 A. Okay. I know that the ratio of tires to total</p> <p>2 sales, which is what calculation A was about, was -- tire</p> <p>3 sales were, in '97, 67.3 percent.</p> <p>4 Q. Oh, excuse me.</p> <p>5 I got you now. So D is B times A?</p> <p>6 A. That's right.</p> <p>7 Q. So your assumption A was tire sales to total</p> <p>8 sales of the plaintiff itself?</p> <p>9 A. Right.</p> <p>10 Q. And you've assumed that that's the same</p> <p>11 percentage that a franchisee would have?</p> <p>12 A. That's correct.</p> <p>13 Q. Let me ask you this question. Going back to</p> <p>14 calculation Roman numeral II-C, that figure is listed, to</p> <p>15 include tires, batteries and parts, on Oscher 0038.</p> <p>16 A. Which number did you give me?</p> <p>17 Q. 0038, Oscher.</p> <p>18 A. You're giving me a Bates number.</p> <p>19 Yes, sir.</p> <p>20 Q. So Roman numeral II-C is not just tire</p> <p>21 purchases; is that correct?</p> <p>22 A. That's correct.</p> <p>23 Q. Do you take care of that later on or something?</p> <p>24 A. Well, what I did was -- I didn't have enough</p> <p>25 information, but when I reviewed the parts sales that</p>	<p>92</p> <p>1 afterwards. I used each individual year as the</p> <p>2 calculation. So I multiplied the 22.9 million --</p> <p>3 Q. Okay.</p> <p>4 A. You're okay?</p> <p>5 Q. Right. Okay. I see what you're saying you</p> <p>6 did.</p> <p>7 So you multiplied the Roman numeral I</p> <p>8 calculation times Roman numeral II-D?</p> <p>9 A. Right.</p> <p>10 Q. What is calculation Roman numeral II-F?</p> <p>11 A. And then II-F finally allowed me to get to the</p> <p>12 percentage of tires purchased from the franchisor. The</p> <p>13 11.6 million in item C is the amount that we just talked</p> <p>14 about, and when you divide that by the calculation in</p> <p>15 II-E, the 17.6, you get 65.9 percent.</p> <p>16 Then, when you multiply -- I'm sorry. Then you</p> <p>17 do the same multiplication, the same calculation, for the</p> <p>18 other years, as well.</p> <p>19 Q. So calculation F is what divided by ??</p> <p>20 A. It is C.</p> <p>21 Q. C divided by E.</p> <p>22 A. What the tire purchases were from the</p> <p>23 franchisees.</p> <p>24 Q. So your conclusion, then, is that franchisees</p> <p>25 purchased, on average, 62.8 percent of their tires from</p>

STEVEN OSCHER, 9/27/02

<p>53</p> <p>1 the franchisor?</p> <p>2 A. For the period of information we had available.</p> <p>3 yes, sir.</p> <p>4 Q. What's calculation Roman numeral III?</p> <p>5 A. Three, if -- and let me give you -- what I took</p> <p>6 is the margin from tire sales by franchise of the</p> <p>7 franchisor to the franchisee.</p> <p>8 Q. Excuse me. You mean iter Roman numeral III?</p> <p>9 A. Yes.</p> <p>10 Now, we're looking at Bates number 38, but the</p> <p>11 numbers, as you pointed out earlier, included tires and</p> <p>12 batteries, and they were making different calculations</p> <p>13 internally. What I went to was the '98 report, and I'll</p> <p>14 give you a Bates number.</p> <p>15 On Bates number 84, Oscher 84, if you go to the</p> <p>16 Year-to-Date column or section, the second group of</p> <p>17 numbers -- the third group of numbers makes reference to</p> <p>18 total margin tires, and then underneath that is a</p> <p>19 percentage and it says 12.72.</p> <p>20 Q. I'm not seeing that.</p> <p>21 A. I know, that's a tough one.</p> <p>22 Is that it right there?</p> <p>23 Q. Okay.</p> <p>24 A. Yeah, and then --</p> <p>25 MR. MALOTT: This needs to be on the record, so</p>	<p>95</p> <p>1 Q. Now, is there another document somewhere within</p> <p>2 this packet for the margin as to all tire sales?</p> <p>3 A. That was the 30 percent that was the margin --</p> <p>4 total margin that they had on tires, which was the first</p> <p>5 calculation that we looked at.</p> <p>6 Q. Have you done any checking to determine if</p> <p>7 these records are accurate?</p> <p>8 A. The checking that I did was -- and now we go</p> <p>9 into the Price Waterhouse and Coopers financial</p> <p>10 statements.</p> <p>11 The opening information that was given in these</p> <p>12 reports was anchoring, if you will, the sales, and it's</p> <p>13 essentially the first page in each of the documents,</p> <p>14 where they're reporting what their income was and what</p> <p>15 their total sales were.</p> <p>16 I went to the audited financial statements and</p> <p>17 confirmed those balances as they appeared and used that</p> <p>18 as my benchmark.</p> <p>19 Q. Did you double-check on the margin?</p> <p>20 A. I didn't do anything with the margins. Again,</p> <p>21 those are internally generated financial statements.</p> <p>22 I wasn't going to go in and re-audit the books.</p> <p>23 The audited financial statements stand for themselves, at</p> <p>24 least in this regard, and I was concerned that I was</p> <p>25 dealing with the total sales which had been set forth in</p>
<p>94</p> <p>1 ve know.</p> <p>2 Q. On Oscher 84, under the right-hand</p> <p>3 "Year-to-Date" column, under "FY Actual," the very last</p> <p>4 number under that first -- or, actually, the second</p> <p>5 grouping is entitled "Percentage Sales," including direct</p> <p>6 "something or another."</p> <p>7 If you go across, there's a percentage listed</p> <p>8 as 12.72. What does that represent to you?</p> <p>9 A. That is the margin on sales of tires that were</p> <p>10 made by the franchisor from the --</p> <p>11 Q. So that's what they state that they're marking</p> <p>12 the tires up to sell to their franchisees?</p> <p>13 A. That's what they're saying that they were</p> <p>14 making. That's my understanding, yes, sir.</p> <p>15 Now, if you move over to the two columns to the</p> <p>16 East Year Actual, that's where you get the percentage</p> <p>17 that you see on Exhibit 80, the 11.87 percent, because,</p> <p>18 unlike the '97 internal financial report, they had set</p> <p>19 out the information for just tires only, and so it was</p> <p>20 picked up there.</p> <p>21 Q. So what this tells you is that their margin is</p> <p>22 actually -- or the markup is actually 11.8 percent</p> <p>23 instead of the eight percent that you were previously</p> <p>24 told?</p> <p>25 A. That's correct, sir.</p>	<p>96</p> <p>1 these internal documents, which made their way up to the</p> <p>2 audited financial statements.</p> <p>3 Q. So does that complete how you calculated these</p> <p>4 three percentage figures?</p> <p>5 A. Yes, sir, it does.</p> <p>6 MR. COLLIER: Okay. I will ask Matt to get</p> <p>7 Donnie.</p> <p>8 MR. CAMPBELL: I'll get him.</p> <p>9 (Recess taken.)</p> <p>10 Q. Show me, then, where you plugged these</p> <p>11 percentages into your report.</p> <p>12 A. Sure.</p> <p>13 We were talking, on Exhibit IV -- and this is</p> <p>14 my Exhibit IV. I don't know. Have you marked those?</p> <p>15 Q. Your Exhibit IV, which for our record is</p> <p>16 Exhibit 77.</p> <p>17 A. Right. Thank you.</p> <p>18 Q. Exhibit 77 is Exhibits IV and V as you redid</p> <p>19 them this morning.</p> <p>20 A. Yes, sir.</p> <p>21 Q. And as I understand you, right now, you're</p> <p>22 going to redo it one more time?</p> <p>23 A. I am.</p> <p>24 Q. So let's go to your Exhibit IV contained within</p> <p>25 our Exhibit 77. Tell me what you've done.</p>

STEVEN OSCHER, 9/27/02

<p>97</p> <p>1 A. If you look to the inventory markup section at 2 the bottom of the exhibit, you can see -- 3 Q. I'll tell you what. Why don't you go ahead and 4 make your changes in red on our exhibit to the 5 deposition. 6 A. Good. 7 What will change is -- the inventory purchase 8 from the franchisors is no longer 78.2 percent. It is 9 now 52.6 percent. 10 Q. All right. 11 A. And the number to be calculated is, when you 12 take the sales of \$5,155,000 for tire sales and you 13 multiply it by these percentages, your new total is 14 \$311,394, which I'm rounding down to \$311,000. 15 That amount then gets carried forward to the -- 16 to the next page, which is Exhibit V, so the \$337,755 is 17 now the \$300,110. 18 The total before incremental expense is now, 19 under the conversion as a franchisee, \$629,379, and as a 20 new franchisee, it's \$988,831. The incremental expenses 21 will change, and as a conversion, it's \$31,469. As a new 22 franchisee, it's \$39,442. 23 So the new totals, as a conversion, are 24 \$557,910, which would be rounded to \$597,500, and for a 25 new franchisee, the total is \$939,389, which is rounded</p>	<p>98</p> <p>1 A. I think you've asked me for a legal conclusion. 2 Q. If Don Leonard had joined up as a franchisee 3 with the plaintiff in 1994, then you've calculated what 4 you believe he would have paid to the franchisor from 5 1994 on Exhibit V? 6 A. That's exactly correct, sir. 7 Q. And if that were the case, the franchisor would 8 also not have received Don Leonard's profits, as you've 9 calculated in the first paragraph on page four? 10 A. Again, that's my understanding, but I don't 11 know the law, so I'm just giving you my -- 12 Q. Well, I'm just asking you as a function of how 13 you understand the franchise agreement worked. Isn't 14 that correct? If Don had signed up as a franchisee -- 15 A. There wouldn't be any reason to go after the 16 profits. 17 Q. Exactly. 18 A. Yes, sir. 19 Q. So, in a sense, if a jury or a judge were to 20 award both defendant's profits and plaintiff's economic 21 damages, that would be double-dipping. Would you agree 22 with that? 23 A. To me, it would. 24 MR. CAMPBELL: Arguably, it calls for a legal 25 conclusion.</p>
<p>99</p> <p>1 to \$935,000. 2 Q. So going back to Exhibit IV, your calculation 3 on inventory markup is based on an assumption that a 4 franchisee, such as Don Leonard, would buy 62.9 percent 5 of its tires from the plaintiff? 6 A. That's correct, sir. 7 Q. Let's go to Exhibit V. This is a calculation 8 that corresponds to that part of your report that 9 attempts to calculate an economic loss for the plaintiff. 10 Is that accurate? 11 A. Yes, sir. 12 Q. Now, is it your understanding or are you of an 13 opinion, in an indication such as this, that the 14 plaintiff would be entitled to both defendant's profits 15 and an economic damages loss, or are you proposing these 16 as alternative measures of damages? 17 A. I think it's my understanding that they're 18 alternative measures of damages. I don't think they're 19 additive. 20 Q. Okay. 21 A. But, then, I don't know what the -- 22 Q. So you're not -- 23 A. I don't know the legal side of it, I guess, is 24 my answer. 25 Q. So you can't say?</p>	<p>100</p> <p>1 Q. Would you agree with that from an accounting 2 standpoint? 3 A. Yes, sir. 4 Q. Now, the economic damages that you've listed 5 here assume, as I understand it, that Don Leonard would 6 have signed up as a franchisee; is that correct? 7 A. Yes, sir. 8 Q. Are you aware of any evidence that suggests 9 that the plaintiff was ever offering franchises here in 10 New Mexico in 1994? 11 A. I think there was some correspondence or 12 communication with Mr. Leonard back then. 13 Again, there's something with regards to 14 another party, and I think that's what I was referring to 15 under "Other" on page four, about a Mr. Fox who had 16 expressed an interest. So, I mean, that's been my 17 understanding from what I've seen. 18 Q. Well, if you were to assume that the plaintiff 19 had no plans to open franchises in New Mexico until the 20 year -- well, even to the present, then would you agree 21 that it's not appropriate to try to calculate damages as 22 if Don Leonard had opened a franchise? 23 MR. CAMPBELL: Objection, calls for a legal 24 conclusion. 25 A. Yeah, I would have given you that answer 1</p>

STEVEN OSCHER, 9/27/02

117

1 taking a look at a franchise for a day once a quarter
2 would have not been a very expensive flight. and, again,
3 within the five percent. it was discussed and felt that
4 it was covered.

5 Q. Is Exhibit 77, then, your final calculation as
6 to economic damages for the plaintiff in this case?

7 A. From the facts as I understand them today, yes,
8 sir.

9 Q. Would it be fair to say that you don't have any
10 other calculations of royalties or franchise fees or any
11 other fees that you believe may be due to the plaintiff
12 as a result of any alleged trademark violation in this
13 case?

14 A. I have not done any other calculations, no,
15 sir.

16 Q. And you're not aware of any other valuation of
17 that that you haven't done in this case?

18 A. I'm confused by your question. Are you asking
19 has somebody else other than me made a calculation?

20 Q. No. Do you intend to do any other type of
21 valuation besides what you've given us in Exhibit 77?

22 A. Again, I don't know. If additional information
23 comes to light and I'm asked by Mr. Campbell to do work,
24 I will.

25 Q. All right. And then you'll let us know about

118

1 that if you do?

2 A. I think Mr. Campbell would.

3 Q. Right.

4 Let me move on to your report, to the section
5 entitled "Corrective Advertising."

6 A. Yes, sir.

7 Q. Have you deleted that from your damages in this
8 case?

9 A. No, I haven't deleted it. The advertising
10 component, you asked about before. It's there. I don't
11 have any additional information with regards to what it
12 might take to provide corrective advertising. I only had
13 the information that Mr. Leonard has used, historically,
14 for his stores.

15 Q. So is it --

16 A. So I have not done anything more than what is
17 stated on page four.

18 Q. Is it fair to say that as we sit here today,
19 you don't have an opinion as to what amount might be
20 needed for corrective advertising?

21 A. That's a correct statement.

22 Q. And would it be fair to say that you're not
23 aware, as we sit here today, of any false impressions
24 that have been associated with the alleged improper use
25 of a trademark?

119

1 A. I don't have any direct information, no, sir.

2 Q. And you've not been given any information from
3 the plaintiffs, as you suggest in your report, about
4 that?

5 A. I have not received any information from the
6 plaintiffs, no.

7 Q. You've testified earlier, from a review of
8 Don's financials, as stated in his papers, that he was
9 not profitable; is that correct?

10 A. His tax returns and his financial statements
11 return a loss, 14 of 15 years.

12 MR. CAMPBELL: Just so the record is correct,
13 when you say "his," are you referring to the Defendant
14 Team -- excuse me, Tires Plus, Inc.?

15 THE WITNESS: For the stores and the
16 information that was reported by Mr. Leonard, yes, sir.

17 MR. CAMPBELL: You used the pronoun "his," and
18 I wanted to make sure --

19 THE WITNESS: Well, he asked me about Don. I'm
20 sorry.

21 Q. You understand that when I've been using "Don
22 Leonard," I've been referring to the defendant in this
23 case, basically?

24 A. That's what I've assumed, yes, sir.

25 Q. You've not done any calculations with the

120

1 assumption that Gary Fox had purchased a franchise
2 operation at any point in time?

3 A. No, sir.

4 Q. Have we covered all of the, first of all,
5 calculations that you've done in this case?

6 A. Yes, sir, I believe we have.

7 Q. Have we covered all of the opinions which
8 you've been asked to give in this matter?

9 A. Yes, sir, I believe we have.

10 Q. And between what you've disclosed in your
11 report as those things that you've reviewed, as well as
12 what you've brought with you here today, have we seen all
13 of those documents upon which you've relied or generated
14 in this matter?

15 A. Yes, sir. I don't think there's anything else.

16 Q. Are you aware of whether or not you're going to
17 work on any rebuttal testimony in this matter?

18 A. That's up to Mr. Campbell. We haven't
19 discussed it.

20 Q. As we sit here today, you haven't discussed any
21 additional work on the case?

22 A. There's been discussions, but I don't think
23 I've been asked to do anything additional.

24 Q. Has there been discussions of things you are
25 considering to do?

STEVEN OSCHER, 9/27/02

121

1 A. Not by me, or at least not at this time.

2 Q. Do you know Mr. Campbell or Mr. Timmerman on

3 anything other than a professional basis? In other

4 words, do you socialize with them, eat out, play golf,

5 that sort of thing?

6 A. I think Mr. Campbell and I have gone to a

7 baseball game, a couple years ago. I've never socialized

8 with Mr. Timmerman.

9 Q. Are you involved in any clubs or churches or

10 those sorts of things with Mr. Campbell?

11 A. No, sir.

12 Q. Now, you stated that you had reviewed a

13 circular, a franchise circular; is that correct?

14 A. Yes, sir.

15 Q. If the plaintiff in this case had advised to

16 its prospective franchisees that the monthly rent

17 estimated to be paid would range from \$6,000 to \$12,000

18 per month, do you have any argument with that?

19 A. I don't know what you're talking about here,

20 sir.

21 Q. Well, the franchise circular is supposed to

22 advise prospective franchisees of what expenses to

23 expect; is correct?

24 A. Sure.

25 Q. If you'll take a look at what was previously

122

1 marked as Defendant's Exhibit 4, page 577-578, the

2 plaintiff in this case advises its prospective

3 franchisees that rent can be expected to be -- I believe

4 it's \$6,000 to \$12,000 a month. Is that correct?

5 A. That's what it says here, yes.

6 Q. Do you have any argument with that being an

7 appropriate figure to expect?

8 MR. CAMPBELL: Objection, lack of predicate,

9 foundation.

10 A. Well, the sentence speaks for itself, and it's

11 also qualifying it by geographic location and size and

12 other economic factors.

13 Q. Right. But the lowest amount is \$6,000 a

14 month; is that correct?

15 MR. CAMPBELL: Objection, predicate,

16 foundation, for this witness to opine on that issue. The

17 best evidence is contained in the document.

18 A. Yes, sir.

19 Q. Well, I'm just asking you, do you have any

20 evidence, sir, that -- in your knowledge that that

21 statement is not correct?

22 A. No. It's contained within the documents, the

23 statements.

24 Q. Right. And you don't argue with that from any

25 knowledge you have?

123

1 A. Sitting here, I don't know of anything that

2 would be different, no, sir.

3 Q. Is it your understanding that a franchisor is

4 supposed to use its best efforts to inform prospective

5 franchisees of what they can expect in terms of expenses?

6 A. I think that's a reasonable statement.

7 Q. The franchise agreement also tells its

8 prospective franchisees that interest to be paid to them

9 would be in the amount of 10 percent and, in some

10 instances, up to 18 percent per annum on certain late

11 payments.

12 Do you have any reason to believe that that's

13 not the typical amount of interest charged on loans for

14 like franchisees?

15 A. I don't know what you're referring to. If I

16 could see the document --

17 Q. Okay.

18 MR. CAMPBELL: Let me just object to this line

19 of questioning, that the document -- whatever exhibit it

20 is --

21 MR. COLLIER: Exhibit 4.

22 MR. CAMPBELL: Exhibit 4 is the best evidence

23 of its content. I don't know that Mr. Oscher is here to

24 opine on the franchise circular. We're not offering him

25 in terms of opinions on the franchise circular.

124

1 Q. What I'm asking you is: As an accountant and

2 an evaluator of businesses, do you have any reason to

3 believe that interest charges in the amount of 10 percent

4 to 18 percent are out of line with what other prospective

5 businesses are charged for a loan?

6 A. I'm trying to see the percentage that you were

7 telling me. I only see the 15 percent, so --

8 Q. All right.

9 A. I don't know where your statement of 10 percent

10 -- I'm sorry.

11 Q. Well, let me take the 18 percent. Do you have

12 any reason to believe that that's not an interest rate

13 that franchisees or other people in the automobile tire

14 business can expect when borrowing money from

15 franchisors?

16 A. That's a penalty rate. That's not a normal

17 rate, sir.

18 Q. So if someone --

19 A. And maybe you didn't see it, because it was

20 covered up here, so -- I'm sorry.

21 Q. So they charge their franchisees 18 percent if

22 they're late on a payment?

23 A. I don't know the answer to that. I think this

24 was just talking about normal fees and interest charges

25 and letting someone know that, if you don't make your